

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 546

ALDEN D. STANTON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1959
CERTIORARI GRANTED DECEMBER 14, 1959

SUPREME COURT OF THE UNITED STATES

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**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK**

No. 14475

ALDEN D. STANTON AND LOUISE M. STANTON,

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

1954

- 6-11-54 Complaint Filed—Summons Issued.
6-15-54 Summons ret'd filed—Served on Deft.
8-13-54 Order extending time to answer to Oct. 13, '54
Filed.
10-11-54 Answer Filed.

1955

- 2-18-55 Deposition of Woolsey A. Shepard Filed.
3-1-55 Notice of filing of deposition with proof of ser-
vice filed.
3-1-55 Note of issue filed.
4-4-55 Galston call eal—Reddy.
7-26-55 Notice of motion filed for summary judgt (ret.
Aug. 10-55).
8-10-55 Bruehhausen, J. Motion for Summary Judgt
adjud to 8-31-55.
8-31-55 Abruzzo; J. Motion for Summary Judgt argued
decision reserved. Exchange 9-7-55 all papers
9-9-55.

[fol. 2]

1955

Affidavit of George T. Rita filed.

- 9- 7-55 Affidavit of George T. Rita in opposition to above motion filed.
- 9-12-55 Supplemental affidavit of Clendon H. Lee filed.
- 9-28-55 By Abruzzo, J. Decision on Motion for Summary Judg't—Motion Denied—See Opinion.
- 10-10-55 By Abruzzo J. order filed denying motion for summary judgment.

1957

- 2- 8-57 Before Abruzzo, J. Case Called Ready & Passed.
- 8-22-57 Notice of motion for pretrial filed (9-4-57).
- 8- 4-57 Before Rayfiel, J. motion for pretrial granted 9-26-57.
- 10-18-57 Notice of Taking Deposition Filed.

1958

- 3- 4-58 Zavatt, J. Case called Ready. Pre-Trial Conference Mar. 18, 1958 at 11:00 a.m. (later, adjd to 3-26-58 2 P.M.).
- 3-26-58 Zavatt, J. Case called. Conference held & concluded. No settlement.
- 9-16-58 Abruzzo, J. Case Called—Ready.
- 9-17-58 Abruzzo, J. Case Called. Assigned to Judge Zavatt.
- 9-18-58 Zavatt, J. case R.P.
- 10- 2-58 Plaintiffs Trial Memorandum Filed as directed.
- 10- 6-58 Bruehhausen, J. Case called. R & P.
- 10-15-58 Byers, Ch. J. Case called. Adjd to Oct. 20, 1958.

1958

- 10-20-58 Byers, Ch. J. Case called. Ready & Passed to Oct. 23, 1958.
[fol. 3]
10-23-58 Byers, Ch. J. Case called. Ready & Passed.
10-27-58 Byers, Ch. J. Case called. Ready & Passed.
10-28-58 Byers, Ch. J. Case called. Trial begun and concluded. At conclusion of taking of testimony, Court makes findings of fact, in favor of the Plaintiff. Settle Judgment on notice.
11-17-58 By Byers, J. Judgment filed & Docketed against Deft for \$15,056.29 with interest.
12-22-58 Notice of appeal filed.

1959

- 1-30-59 Notice of Motion filed to ext time of Deft to file appeal to Mar. 20, 1959 (2-11-59).
2-6-59 Affidavit of Clendon H. Lee filed.
2-11-59 Bruehhausen, J. Hearing on motion to extend time of Deft. to file appeal etc. granted—Settle Order.
2-19-59 By Bruehhausen, J. Order filed extending time to file record on appeal to Mar. 20, 1959.
3-18-59 Stenographers minutes filed.
3-19-59 Record on Appeal handed to Miss Lammm (U.S. Atty office) cert. & with 3 copies of Index to be delvd to C of A.
3-23-59 Copy of Index on appeal recd from C. of A. acknowledging record on appeal filed.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—June 11, 1954

The Plaintiffs, appearing herein by their attorneys, O'Connor & Farber, for their complaint against the Defendant, respectfully show to this Court, and upon information and belief allege as follows:

1. This action is brought under Title 28, United States Code, Section 1346 and Section 1402(a), as hereinafter more fully appears.
2. At all times hereinafter mentioned, the Plaintiffs were, and now are citizens of the State of New York, residing at 453 Greene Avenue, in the Borough of Brooklyn, County of Kings, State of New York.
3. At all times subsequent to May 21, 1944 until October 23, 1951, one Joseph P. Marcelle, was Collector of Internal Revenue for the First District of New York, and at all times subsequent to October 23, 1951 through June 30, 1952, one Henry L. Hoffman, was acting Collector of Internal Revenue for the First District of New York, and at all times subsequent to June 30, 1952 through April 10, 1954 the said Henry L. Hoffman was District Director of Internal Revenue for the Brooklyn District. Neither the said Joseph P. Marcelle nor the said Henry L. Hoffman is in office as Collector of Internal Revenue at the time this action is commenced.
4. This suit is brought for the recovery of \$15,056.29, representing \$10,629.57 erroneously and illegally assessed against the Plaintiffs as income tax for the calendar year 1943 and \$4,426.72 as interest thereon, and as such, erroneously and illegally collected from the Plaintiffs by said Joseph P. Marcelle, as Collector of Internal Revenue; and the said Henry L. Hoffman, as Acting Collector of Internal Revenue.

[fol. 5] 5. In 1942, the Plaintiff Alden D. Stanton was Comptroller of the Corporation of Trinity Church and

President of Trinity Operating Company, Inc. The latter Corporation was a wholly owned subsidiary of the Corporation of Trinity Church and was engaged in managing its properties. The Plaintiff Alden D. Stanton tendered his resignations from the said offices in 1942 and, on November 9, 1942, the resignations were accepted. At a meeting of the Board of Directors of Trinity Operating Company, Inc. held November 19, 1942, after the resignations had been accepted, a gratuity was voted to the Plaintiff Alden D. Stanton in the amount of \$20,000., payable to him in monthly installments of \$2,000. each, commencing with the month of December, 1942. In December, 1942, the said Plaintiff received \$2,000. of said gratuity and, in 1943, said Plaintiff received \$18,000. of said gratuity.

6. The resolution of the Board of Directors of Trinity Operating Company, Inc. provided that:

"A gratuity is hereby awarded to him (Plaintiff Alden D. Stanton) of Twenty Thousand Dollars."

Subsequently, the payments were divided between that company and the Corporation of Trinity Church; the Church paying \$9,600. and Trinity Operating Company paying \$10,400. Each corporation entered the payment to the said Plaintiff on the corporate books as a gratuity.

7. The salary received by the Plaintiff Alden D. Stanton prior to the date of his resignation was at ~~the~~ annual rate of \$12,000. from Trinity Church, and \$10,500. from Trinity Operating Company, Inc.

8. Within the time prescribed by law, the Plaintiffs duly made and filed with the Collector of Internal Revenue for the First District of New York, then in office, their joint income tax returns for the calendar years 1942 and (fol. 6) 1943, and during the years 1943 and 1944, duly paid to the Collector of Internal Revenue for the First District of New York, then in office, the income tax assessed upon such returns. In their joint income tax returns for the years 1942 and 1943, filed as aforesaid, the Plaintiffs reported the amount of said gratuity, but omitted from gross income, as a gift, the amount thereof.

9. Thereafter, the Commissioner of Internal Revenue caused the aforesaid returns of the Plaintiffs for the calendar years 1942 and 1943 to be examined and, as a result of such examination, the Commissioner determined that there was a deficiency in income tax due from the Plaintiffs for the calendar year 1943 in the amount of \$10,629.57, and assessed against the Plaintiffs as additional income tax for the calendar year 1943, said sum of \$10,629.57. In reaching his determination that there was a deficiency in income tax due from the Plaintiffs for the year 1943, the Commissioner of Internal Revenue refused to allow as an exclusion from gross income the aforesaid gratuity of \$20,000. received by the Plaintiff Alden D. Stanton and the entire amount of the aforesaid deficiency resulted from the refusal of the Commissioner to allow such exclusion.

10. Thereafter, on or about December 5, 1949, the said Joseph P. Marcelle, as Collector of Internal Revenue for the First District of New York, demanded of the Plaintiffs said sum of \$10,629.57 as additional income tax for the year 1943 and, in addition thereto, the sum of \$3,595.85 as interest upon such additional tax. From January 24, 1950 to January 23, 1952, in installment payments, the Plaintiffs paid to the said Joseph P. Marcelle and the said Joseph P. Marcelle collected from the Plaintiffs as additional income tax for the year 1943 the sum of \$5,929.57, and as interest upon the additional tax assessed, the sum [fol. 7] of \$3,595.85, and the Plaintiffs paid to the said Henry L. Hoffman and the said Henry L. Hoffman collected from the Plaintiffs as additional income tax for the year 1943, the sum of \$4,700. and as interest upon such additional tax, the sum of \$830.87.

11. On or about January 23, 1952, and prior to January 24, 1952, the Plaintiffs duly filed with the said Henry L. Hoffman a claim for the refund of \$15,056.29, alleged to have been erroneously and illegally assessed against and collected from them as income tax and interest thereon for the calendar year 1943. A true copy of said claim for

refund, marked Exhibit A, is annexed hereto and made a part hereof.

12. On November 7, 1952 the Commissioner of Internal Revenue notified the Plaintiffs by registered mail of the rejection and disallowance on the schedule of the aforesaid claim for refund.

13. The amount of the aforesaid gratuity of \$20,000 was properly excluded from gross income by the Plaintiffs in their income tax returns for the years 1942 and 1943 pursuant to the provisions of Section 22(b)(3) of the Internal Revenue Code, and the refusal of the Commissioner of Internal Revenue to allow such exclusion in determining the income tax liability of the Plaintiffs for the year 1943 was erroneous and without warrant in law. By reason of such error, there has been erroneously and illegally assessed against and collected from the Plaintiffs and paid into the Treasury of the United States, as income tax for the year 1943, and interest thereon, the sum of \$15,056.29. Said sum of \$15,056.29 was illegally, and without warrant and authority of law, demanded and collected by the said Joseph P. Marcelle and Henry L. Hoffman from the Plaintiffs in installments from January 24, 1950 to January 23, 1952.

[fol. 8] 14. Although repayment thereof has been demanded, no part of the said sum of \$15,056.29 has been credited, remitted, refunded or repaid to the Plaintiffs or to anyone on their account, and the full amount thereof, as indicated by the schedule appended hereto as Exhibit A, together with interest thereon from the dates of payment at the rate of one-half ($\frac{1}{2}\%$) per cent per month, remain due and owing from the Defendant to the Plaintiffs.

Wherefore, the Plaintiffs demand judgment against the Defendant, United States of America, for the sum of \$15,056.29, with interest thereon at the rate of one-half ($\frac{1}{2}\%$) per cent per month on installment payments made at the following times and in the following amounts:

January	24, 1950	\$ 4,595.85
February	7, 1950	1,629.57
March	7, 1950	1,000.00
May	11, 1950	500.00
January	11, 1951	100.00
January	18, 1951	100.00
January	25, 1951	100.00
February	2, 1951	100.00
February	8, 1951	100.00
February	15, 1951	100.00
February	24, 1951	100.00
March	2, 1951	100.00
May	7, 1951	100.00
May	14, 1951	100.00
June	4, 1951	100.00
July	11, 1951	100.00
July	23, 1951	100.00
August	1, 1951	100.00
August	9, 1951	100.00
August	21, 1951	100.00
September	5, 1951	100.00
September	21, 1951	100.00
November	1, 1951	100.00
December	6, 1951	100.00
December	26, 1951	100.00
January	23, 1952	5,230.87
		\$15,056.29

together with the costs and disbursements of this action:

O'Connor & Farber, By William F. Snyder, Partner.

[fol. 9]

IN UNITED STATES DISTRICT COURT

~~ANSWER—Filed October 11, 1954~~

The United States of America by its attorney, Leonard P. Moore, United States Attorney for the Eastern District of New York, for answer to the complaint alleges:

1. Admits each and every allegation in paragraph 1 of the complaint.
2. Admits each and every allegation in paragraph 2 of the complaint.
3. Admits each and every allegation in paragraph 3 of the complaint.
4. Denies each and every allegation in paragraph 4 of the complaint, except it admits that suit is brought for the recovery of \$15,056.29 taxes and interest.
5. Denies each and every allegation in paragraph 5 of the complaint.
6. Denies each and every allegation in paragraph 6 of the complaint.
7. Admits each and every allegation in paragraph 7 of the complaint.
8. Denies each and every allegation in paragraph 8 of the complaint, except it admits that plaintiffs filed joint income tax returns for the years 1942 and 1943 and paid their taxes.
9. Denies each and every allegation in paragraph 9 of the complaint, except it admits that the Commissioner of Internal Revenue determined that there was a deficiency in income tax due from the plaintiffs for the calendar year 1943 in the amount of \$10,629.57 and assessed additional income tax for the year 1943 in that amount.
10. Admits each and every allegation in paragraph 10 of the complaint.

[fol. 10] 11. Denies each and every allegation in paragraph 11 of the complaint, except it admits that plaintiffs filed a claim for refund in the amount of \$15,656.29. It further admits that Exhibit A is a true copy of that claim for refund.

12. Admits each and every allegation in paragraph 12 of the complaint.

13. Denies each and every allegation in paragraph 13 of the complaint.

14. Denies each and every allegation in paragraph 14 of the complaint, except it admits that no part of the amount claimed by the plaintiffs has been paid to them.

Wherefore, defendant demands judgment dismissing the complaint.

Leonard P. Moore, United States Attorney, Eastern District of New York, Attorney for Defendant, 271 Washington Street, Brooklyn, New York, By: Elliott Kahaner, Assistant United States Attorney.

[fol. 11]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed Jul. 26, 1955

The plaintiffs move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law.

2. This motion is based upon:

(a) Affidavit of Alden D. Stanton, duly verified the 25th day of July, 1955, annexed hereto;

(b) Deposition of Woolsey A. Sheppard of January 17, 1955, duly filed the 18th day of February, 1955, true copy of which is annexed hereto;

- (c) Affidavit of Reginald R. Belknap, duly verified the 16th day of February, 1955, annexed hereto;
- (d) Summons and complaint, true copies of which are annexed hereto; and
- (e) Answer, true copy of which is annexed hereto.

Dated, New York, N. Y., July 25, 1955.

Yours, etc.

O'Connor & Farber, By William F. Snyder, A Member of the Firm, Attorneys for Plaintiffs, Office and Post Office Address, 120 Broadway, New York 5, N. Y.

[fol. 12]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION DENYING MOTION FOR SUMMARY
JUDGMENT—September 28, 1955

ABRUZZO, D.J.:

Plaintiffs instituted this action to recover the sum of \$15,056.29 representing income taxes for the calendar year 1943 and interest which they allege was erroneously and illegally assessed and was erroneously and illegally collected by the Collector and Acting Collector of Internal Revenue for the First District of New York.

The action is brought under Title 28 of the United States Code, Sections 1346 and 1402(a).

All factual references will refer to the plaintiff, Alden D. Stanton. The plaintiff, Louise M. Stanton, is the wife of Alden D. Stanton, and she was named as a party-plaintiff because she and her husband filed a joint income tax return for the year in question.

In 1933 or 1934 plaintiff entered the employ of Trinity Church to manage its real property. Thereafter a New York corporation was formed known as Trinity Operating Company, Inc., and plaintiff became president and a member of the board of directors of the operating company. He eventually was named comptroller of the church but was never a vestryman or warden thereof. He was actively

engaged on a full-time basis in managing the real estate investments of Trinity Church and its subsidiaries and in reorganizing and rehabilitating their properties, and in 1942 had been receiving an annual salary of \$22,500.

Desiring to engage in business on his own, he submitted his resignations on November 9, 1942, as comptroller of Trinity Church and president of the operating company to become effective at the pleasure of the vestry and of the board of directors respectively. The resignations were accepted [fol. 13] to become effective November 30, 1942. He was not discharged but resigned voluntarily.

On November 19, 1942, at a meeting of the board of directors of the operating company the following preamble and resolution were adopted:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

Plaintiff was not present at the meeting nor did he vote on such resolution or participate in any way in the discussions which preceded it. The payments in the aggregate amount of \$20,000 were paid, \$9,600 by Trinity Church and \$10,400 by the operating company, and the reason

why the payments were made in instalments rather than in a lump sum was to avoid placing any undue burden on the church and its subsidiaries. There was no consideration [fol. 14] whatever which entered into the passing of the resolution nor did the church or any of its subsidiaries owe the plaintiff any money on account of salary or for any other reason. The \$20,000 was paid to plaintiff as a gratuity and bore no relationship to his salary and was treated by the donor as a gratuity on its books. Neither the church nor the operating company received any federal tax benefit on account of the gratuity paid to the plaintiff, nor were any amounts withheld from such payments.

Plaintiff had been a member of the pension plan of Trinity Church but contributions paid by him were returned to him subsequent to his resignation.

Plaintiff and Mrs. Stanton filed joint income tax returns for the years 1942 and 1943 and paid the income tax assessed. In such returns the amount of the gratuity was set forth as a gift but was excluded from gross income. The returns were audited and the Commissioner of Internal Revenue determined that there was a deficiency in taxes from plaintiff for the year 1943 in the amount of \$10,629.57, based on plaintiff's alleged erroneous exclusion of the gratuity from gross income of the plaintiffs. The deficiency together with interest was assessed against the plaintiffs and they paid the tax and interest in the total amount of \$15,056.29 to the Collector of Internal Revenue.

Plaintiffs filed a claim for refund but the claim was rejected and disallowed and they have instituted this action to recover said amount. They are now moving for summary judgment.

The summary of facts above related are those set forth in the papers submitted by plaintiffs in support of their motion and are not in any way controverted by the defendant, but in opposing this motion the defendant raises the objection that it has had no opportunity to cross-examine [fol. 15] the plaintiff, Alden D. Stanton, and Reginald R. Belknap, a vestryman and church-warden of Trinity Church who has submitted an affidavit in support of plaintiffs' application. The defendant contends that the ultimate fact is whether or not a gift was made and that this fact can

only be established by showing donative intent; that with respect to this the credibility of plaintiffs' witnesses is of the utmost importance and since the facts are peculiarly within the plaintiffs' knowledge the defendant must have the right of cross-examination, and that the issues raised by the pleading be passed upon by the Court after it has seen plaintiffs on the stand and had an opportunity to judge their credibility.

"If the sum of money under consideration was a gift and not compensation, it is exempt from taxation . . ." Bogardus v. Commissioner, 302 U.S. 34, 40 [19 AFTR 1195]. However, this Court is bound by the decisions in this Circuit. In Arnstein v. Porter, 154 F.2d 464 (C.A. 2), it was held (p. 471):

But where, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge. ***

In Bishop v. Shaughnessy, 119 F. Supp. 62 (ND NY), it was said (p. 65):

This Court is bound by the decisions within this circuit, and the oft-cited cases of Doehler v. U. S., [fol. 16] 2 Cir., 149 F. 2d 130, and Arnstein v. Porter, 2 Cir., 154 F.2d 464, are declaratory of the law. We are admonished in the Doehler case that a litigant has a right to a trial where there is the slightest doubt as to the facts. The ultimate fact here is whether or not gifts were made, and that fact depends upon a determination of the donor's intention. In the Arnstein case we are further admonished that summary judgment is improper, and a trial indispensable where credibility is crucial. Here, the evidence of a gift is

apparently to be established by evidence of the plaintiff and the members of his family. Certainly credibility here is an important factor. We are further admonished in the Arnstein case that the right of cross-examination is not to be lightly foreclosed, especially as to matters peculiarly within—as in this case—the plaintiff's knowledge. The two cases referred to above have been cited many times, and they have been followed by later decisions within this circuit. Colby v. Klune, 2 Cir., 178 F.2d 872; Fogelson v. American Woolen Co., 2 Cir., 170 F.2d 660; Boro Hall Corp. v. General Motors, 2 Cir., 164 F.2d 770; Bozant v. Bank of New York, 2 Cir., 156 F.2d 787. ***

In the instant case, defendant has cross-examined Woolsey A. Shepard, a member of the vestry and General Counsel of Trinity Church, whose deposition was taken on December, 1954, but the defendant cannot be foreclosed from cross-examining the plaintiff, Alden D. Stanton, or Reginald R. Belknap, and, therefore, the motion for summary judgment must be denied.

[fol. 17]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

October 10, 1955

At Brooklyn, New York, in said District, on the 10th day of October, 1955.

The plaintiffs having moved this Court by Notice of Motion for an order granting plaintiffs summary judgment and the motion having come on to be heard before me on August 31, 1955, and O'Connor & Farber, attorneys for the plaintiffs having appeared in support of the motion, and Leonard P. Moore, United States Attorney for the Eastern District of New York, having appeared in opposition thereto, and upon reading the affidavits and memoranda of law submitted in support of and in opposition to the motion, and the Court having filed its memorandum opinion,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the defendant, it is

Ordered, that the plaintiffs' motion for summary judgment be and the same hereby is in all respects denied.

Matthew T. Abruzzo, U. S. D. J.

[fol. 18]

IN UNITED STATES DISTRICT COURT

Transcript of Proceedings

Brooklyn, New York,
October 29, 1958.

Before: Honorable Mortimer W. Byers, U. S. D. J.

APPEARANCES:

Messrs. O'Connor & Farber, Attorneys for Plaintiffs, 120 Broadway, New York, New York, By: Clendon H. Lee, Esq., Of Counsel.

Cornelius W. Wickersham, Jr., Esq., United States Attorney for the Eastern District of New York, By: Lloyd Baker, Esq., Asst. United States Attorney, and

APPEARANCES:

Colloquy Between Court and Counsel

By: George Rita, Esq., Special Assistant to the Attorney General.

The Court: Paragraph five of the complaint, does it deny Stanton was the controller of the corporation?

Mr. Rita: No.

The Court: What is it, that is denied as to that paragraph?

I am trying to find out what the proof is going to be needed. Does the Government require the plaintiff to prove his official status in 1942 as controller of the one corporation and president of the other?

Mr. Rita: We admit that he was the controller of Trinity Church, and president of the operating company.

The Court: Do you see the answer? Have you the answer before you?

Mr. Rita: Yes, your Honor.

Mr. Lee: We have a stipulation in this case if Mr. Rita [fol. 19] will join with me, will alviate the problem on pleadings.

The Court: Well, you see, the answer denies 5 and 6 as alleged in the complaint.

Mr. Rita: That is right.

The Court: I am simply inquiring whether it is going to be necessary to take proof to sustain the allegation.

Mr. Rita: Your Honor, the allegations generally in five were to the very crux of the matter, that is, the allegation was, a gratuity was paid to Mr. Stanton and we deny that.

The Court: Oh, it is the nature of the transaction?

Mr. Rita: That is correct.

The Court: Not the fact of office holding and the fact there was vote taking?

Mr. Rita: We stipulate he was the controller and also the president of the operating company.

The Court: Isn't the word "duly," that is the subject of the denial of paragraph 11, is that all that denial is directed to?

Mr. Rita: No, your Honor, we deny each and every allegation, except admit that a claim had been filed.

Mr. Lee: If the Court please, we have a pretrial stipulation which I assume is filed.

Mr. Rita: I didn't file it.

The Court: I just wanted to find out what matters are really in issue, that is all. Does it get down to a question of whether this sum voted in some way or other is a gift?

Mr. Lee: I believe that is under the pretrial stipulation, if I may read into the record, the pre-trial stipulation dated October 25, 1957.

It is stipulated that the amounts of payments set forth in the complaint are accurate.

[fol. 20] That a proper claim for refund was filed and a refund denied.

It is our understanding, your Honor, that it is set forth in a short trial memorandum which I filed with Judge Zavatt when we thought it was coming before Judge Zavatt.

My understanding is, the only thing in issue here, is the ultimate fact whether it is a gift or compensation.

The Court: Do you agree?

Mr. Rita: The issue is whether or not it was a gift or compensation, that is correct.

The Court: The pre-trial stipulation I think should be incorporated in the record.

I suppose that it will take the place of considerable testimony, won't it?

Mr. Lee: I should think that it would.

I believe the concession of my adversary and my reading of the stipulation should cover that.

Mr. Rita: I should think so.

The Court: You better read it into the record.

Mr. Lee: I previously read Paragraph 1.

I will read Paragraph 2:

"The parties are prompt to prepare a stipulation of facts insofar as they can be stipulated.

"3. Any depositions or discovery proceedings to be completed by January 1, 1958.

"4. The parties stipulate it will take one-half day in which to try the case. Trial is to be before the Court. The case is to be ready for trial by January 1, 1958.

"5. The foregoing provisions are binding on the parties and will control the subsequent course of this litigation unless relieved against on notice of motion because of undue hardship."

[fol. 21] Signed by George G. Rita, on behalf of the Department of Justice, and signed by me on behalf of the plaintiffs.

The Court: Has there been any application to be relieved of that stipulation?

Mr. Lee: No, your Honor.

It was the first paragraph of the stipulation to which I referred a moment ago, which I believe limits the ques-

tion of proof here to a question of whether it is a gift or compensation.

Would it be helpful if I re-read that paragraph?

The Court: Go ahead, all right.

By Mr. Lee:

"It is stipulated that the amounts of payments set forth in the complaint are accurate, that a proper claim for refund was filed, and a refund was denied."

Shall we proceed?

The Court: Please.

Mr. Lee: We intended to call Mr. Woolsey A. Sheppard, who is the general counsel for Trinity Church, but he is in the hospital with a heart attack.

With the Court's permission I should like to ask Mr. Frederick Hasler, who is here, if he would read the answers which Mr. Sheppard gave at the deposition which was previously filed, which will be the questions which I will read.

The Court: Yes.

The deposition was sworn to, was it?

Mr. Lee: Yes, your Honor, the deposition was sworn to and filed, and Mr. Rita was present and cross-examined.

The Court: It was the deposition of—

Mr. Lee: Of Woolsey A. Sheppard.

The Court: The deposition was taken?

Mr. Lee: Taken on January 17, 1955, before William J. [fol. 22] Donovan, Notary Public, at the office of O'Connor & Farber, 120 Broadway, New York 5.

It was filed with this Court, February 18, 1955.

The Court: I would like to follow it.

Mr. Hasler: If you are going to ask me questions, I should make a note as usual?

Mr. Lee: No, you are giving Mr. Sheppard's answers.

The Court: I don't suppose you are going to read all of the questions and answers, are you?

Mr. Lee: I will read a good many of them, your Honor.

The Court: Why don't you, for the sake of the record, just specify the ones that you think are important?

The deposition is on file and you can offer it in evidence as part of the case.

I suggest that for the brevity of the record, you merely read the questions and answers that you feel are really material.

Mr. Rita: Your Honor, how about the objections as to relevancy, competency—

The Court: They will be passed upon at the trial.

When you reach a question to which an objection has been made, I will have to rule on it.

By Mr. Lee:

"Q. What is your name, sir?"

Mr. Hasler: Frederick Hasler.

Mr. Lee: No, sir, this is the deposition of—

Mr. Hasler: I speak as if I am Mr. Sheppard?

Mr. Lee: That is correct.

"A. Woolsey A. Sheppard.

"Q. Where do you reside?

"A. Atlantic Highlands, New Jersey.

"Q. Mr. Sheppard, in 1942, were you connected in any way with Trinity Church Corporation.

"A. Yes, sir, I was a member of the Vestry and also of its general counsel.

[fol. 23] "Q. Were you connected with Trinity Operating Company?

"A. Yes, sir, I was its general counsel.

"Q. Did you have any connection with the pension plan of the Trinity Church or of Trinity Operating Company?

"A. Yes, I participated in the making up of that plan and I was one of the trustees under the plan.

"Q. In 1942, was the plaintiff, Allen D. Stanton, employed by Trinity Church, or by Trinity Operating Company?

"A. Yes, by both. He was controller of Trinity Church, and president of Trinity Operating Company.

"Q. Did Trinity Operating Company keep minutes of the meetings of the Board of Directors?

"A. Yes.

"Q. Did the corporation of Trinity Church keep minutes of its meetings?

"A. They did.

"Q. I show you a letter dated December 29, 1942, on the letterhead of Trinity Operating Company, Incorporated, 74 Trinity Place, addressed to Allen D. Stanton, and signed by Reginald R. Belnap, and I ask you whether you recognize the signature?

"A. Yes, I am very familiar with it. I have known Mr. Belnap a great many years.

"Q. Have you seen his signature before?

"A. Yes, a number of times.

"Q. Have you exchanged correspondence with him?

"A. A number of years ago I think I had occasion to write him a letter and received a reply. I don't recall the incident now.

"Q. Do you recognize the signature to be that of Admiral Belnap?

"A. I do."

[fol. 24] Mr. Lee: I offer it in evidence as Plaintiff's Exhibit 1.

Mr. Rita: No objection to that.

The Court: That is the letter dated December 29, '42?

The Clerk: Yes, your Honor.

The Court: To whom?

Mr. Lee: To Allen D. Stanton.

The Court: By?

Mr. Lee: Reginald R. Belnap.

The Court: Plaintiffs' Exhibit No. 1.

(A letter, marked Plaintiffs' Exhibit No. 1 in evidence.)

By Mr. Lee:

"Q. I show you Plaintiffs' Exhibit 1, Mr. Sheppard, and ask you whether that letter correctly sets forth certain resolutions adopted by Trinity Operating Company?

"A. Yes, it sets forth the resolutions in full as they were adopted at the time.

"Q. Now, with respect to the corporation of Trinity Church, were such resolutions ever ratified, or approved by Trinity Church?

"A. Yes, all the minutes of the Operating Company were submitted to the Vestry of Trinity Church for their approval, or correction, as the case may be.

"Q. After such resolutions or minutes were submitted, were they in fact approved, or was any action taken?

"A. My recollection is that these were approved.

"Q. In 1942 did Allen D. Stanton cease to be employed by Trinity Church or Trinity Operating Company?

"A. Yes, sir, he resigned.

"Q. Was such resignation requested?

"A. No, he resigned.

[fol. 25] "Q. Was there any pressure put on him to resign?

"A. None, on the contrary.

"Q. When you say 'on the contrary,' can you tell us what that means?

"A. Well, the Chairman of the Standing Committee requested me to speak to Mr. Stanton, whom I knew personally, ask him if he would reconsider his resignation.

"Q. Did you speak to Mr. Stanton?

"A. I did.

"Q. Was Mr. Stanton paid for his services to Trinity Church?

"A. Yes, sir, he received regular salary.

"Q. At the time of his resignation did Trinity Church or Trinity Operating Company owe Mr. Stanton any money?"

Mr. Rita: That is objected to, it calls for a legal conclusion.

The Court: Overruled, it is a statement of fact.

Mr. Hasler: Do I read Mr. Rita's objection?

The Court: No, read the answer.

Mr. Lee: I asked that question.

"A. At the time of his resignation—"

The Court: The answer is "No."

By Mr. Lee:

"Q. At that time did Mr. Stanton have any claim against Trinity Church or Trinity Operating Company?

"A. None that I know of."

Mr. Rita: I object to it, it calls for a conclusion.

Mr. Lee: There was no objection made.

Mr. Rita: I reserved the right to object.

The Court: Overruled, that is a statement of fact.

Mr. Lee: "A. None that I know of aside from his regular salary.

[fol. 26] "Q. Plaintiffs' Exhibit 1 contains the language: 'A gratuity is hereby awarded to him' (meaning Mr. Stanton) 'of \$20,000.'

"Can you state whether Trinity Church or Trinity Operating Company ever received any Federal income tax benefit by deducting such payment as an expense?

"A. No, Trinity Church being a religious corporation, and the Court having decided that the operating company was merely a Department of Trinity Church Corporation, neither one ever filed or was asked to file a tax return.

"Q. For the purpose of the record can you state who owned Trinity Operating Company?

"A. All the stock was owned by the corporation of Trinity Church and all of the directors were members of the Vestry of Trinity Church, with the exception of Mr. Stanton.

"Q. With respect to the \$20,000 voted to Mr. Stanton was any portion of that withheld for Federal tax purposes?

"A. No.

"Q. Was any information return filed by Trinity Church or Trinity Operating Company with respect thereto?

"A. Not to my knowledge.

"Q. I show you a letter dated April 17, 1945, on the letterhead of Wise, Sheppard, Houghton & Kelly, addressed to this firm, and ask you whether you signed that letter, Mr. Sheppard?

"A. Yes, sir; that is my signature."

Mr. Lee: I offer it in evidence, as Plaintiffs' Exhibit No. 2.

Mr. Rita: I object to it as a self-serving declaration; also, it is not the best evidence.

The Court: May I see it, please?

[fol. 27] (Handing document up to the Court.)

The Court: Objection overruled.

(A letter, dated April 17, 1945, received in evidence as Plaintiffs' Exhibit No. 2.)

By Mr. Lee:

"Q. I show you another letter dated October 27, 1944, on the same letterhead, and ask you whether you signed that letter?

"A. That is my signature."

Mr. Lee: I offer this in evidence as Plaintiffs' Exhibit No. 3.

Mr. Rita: I object to the exhibit on the ground that it is a self-serving declaration; and not the best evidence.

The Court: May I see it, please?

(Handing document up to the Court.)

The Court: Objection—what is the objection?

Mr. Rita: On the ground that it is a self-serving declaration; and it is not the best evidence.

It is a legal conclusion.

The Court: On whose behalf is the alleged self-serving declaration made?

Mr. Rita: Pardon me, sir?

The Court: On whose behalf do you say there is a self-serving declaration?

Mr. Rita: Mr. Stanton's attorney requested this opinion from Mr. Sheppard.

The Court: Yes; Mr. Sheppard wrote the letter.

Mr. Rita: That is correct.

The Court: What assertion did he make that you say is a self-serving declaration?

He had no interest whatsoever to serve.

Mr. Rita: This is a self-serving declaration on behalf of the moving party.

[fol. 28] The Court: Well, you and I don't understand what self-serving declaration means.

Your objection is overruled.

Mr. Rita: I also object on the ground that it is hearsay.

The Court: If you wish to examine the writer of that letter, or cross-examine him, I suppose you can subpoena him for that purpose.

We are trying to find out the truth in this case, the nature of the transaction. This seems to be competent evidence of the nature of the transaction, as I understand it.

Now, if you wish to call Mr. Woolsey and cross-examine him, that is your privilege.

(Letter of October 27, 1944, received in evidence as Plaintiffs' Exhibit No. 3.)

By Mr. Lee:

"Q. Mr. Stanton,"—

I am afraid that that is a typographical error. I should have said Mr. Sheppard in the deposition.

"At the time the resolution was adopted voting a gratuity of \$20,000 to Mr. Stanton, was there any reason for Trinity Church Corporation, or Trinity Operating Company, to retain Mr. Stanton's good will?

"A. No.

"Q. Did Mr. Stanton have any voice in voting such gratuity?

"A. No, he did not.

"Q. After Mr. Stanton's resignation, did he render any services to Trinity Church Corporation, or to Trinity Operating Company?

"A. No, I believe he was subpoenaed as a witness in a lawsuit which was brought against Trinity Church some years later, but as I say, he obeyed a subpoena.

"Q. Do you know whether Mr. Stanton was refunded [fol. 29] his pension payment by the corporation of Trinity Church, or Trinity Operating Company?

"A. I was so informed by the treasurer and his successor as controller."

Mr. Rita: I object to that on the ground it is hearsay.

The Court: Yes, but it is not harmful.

Your objection is overruled.

By Mr. Lee:

"Q. Did Mr. Stanton request any payment from Trinity Church after his resignation?

"A. No.

"Q. At the time the resolutions which are set forth in Plaintiffs' Exhibit No. 1, were adopted, were you present at that meeting?

"A. I was.

"Q. What did you have in mind when you voted that?

"A. We were going to make Mr. Stanton—"

Mr. Rita: I object on the ground that the witness is incompetent to testify as to the intention of the board of directors of the operating company.

The Court: Well, I think that he may state what his own intention was.

Mr. Rita: That is true, but he is stating it in the plural.

The Court: I think the objection is really to the answer, rather than to the question.

The answer was, "We were going," which is not indicative of his own frame of mind.

I will sustain the objection.

Now, you say that you rephrased the question.

Mr. Lee: Yes, your Honor, I will skip down to the next question:

"At the time you voted on the resolution, Mr. Shepard, what was your intention?"

"A. To give Mr. Stanton—"

[fol. 30] Mr. Rita: I object; it calls for subjective process of the witness' mind.

The Court: Will you tell me how the Court is going to find out if this was a gift or not, if you are going to shut every avenue of inquiry?

The Court has no interest in this controversy. The Court is trying to find out what the facts are.

Here is a man who was on the board, who cast a vote. Why shouldn't the Court be informed as to what he says about it?

Mr. Rita: This is the witness' own feeling in the matter. Whether it is a gift or not, it is up to the Court.

The Court: Of course, and if you are going to try to exclude all evidence that will inform the Court, I don't see how the Court can reach a conclusion.

I think that your objection is futile, it is overruled.

By Mr. Lee:

"At the time you voted on the resolution, Mr. Sheppard, what was your intention?

"A. To give Mr. Stanton a gift.

"Q. At or prior to the vote, did you discuss with the other members of the board of directors in the meeting the proposed action of the board of directors?

"A. Yes, there was a good deal of discussion.

"Q. Were you present?

"A. I was.

"Q. Did you participate in the discussion?

"A. I did.

"Q. Based upon your being present and participating in that discussion, can you state what was the intention of the board of directors?"

Mr. Rita: That is objected to on the ground the witness is incompetent to testify as to the intention of the board of directors.

The Court: Overruled.

By Mr. Lee:

"Q. Can you state what the intent of the board of directors was in adopting such resolution?

[fol. 31] "A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.

"He did a splendid piece of work, we felt.

"Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift?

"A. No question about it."

Mr. Rita: I object to it again.

The Court: Overruled.

By Mr. Lee:

"Q. Can you state when Mr. Stanton first was employed by the corporation of the Trinity Church, or Trinity Operating Company?

"A. I cannot recall the date. I know that when Mr. Stanton first came to the corporation, a man named Crane was the controller—no, Mr. Purdy was the controller.

"Mr. Purdy only devoted a portion of his time to the business of the corporation.

"Mr. Stanton was engaged to handle the real estate of Trinity Church at one of the departments of the whole corporation as distinguished from its religious end. When Mr. Purdy resigned, Mr. Stanton was made controller; but the dates I cannot remember.

"Q. Was that approximately 1933?

"A. I would think about then, yes.

"Q. At that time was the property of Trinity Church heavily encumbered?

"A. Yes, it was.

"Q. When I say heavily, would that be in excess of many millions of dollars?

[fol. 32] "A. Yes, in excess of two or three millions.

"Q. At the time Mr. Stanton resigned, had there been any change in the status of Trinity's temporal affairs?

"A. Yes, the mortgage indebtedness had been somewhat reduced, substantially reduced.

"As to a number of buildings which had been erected on ground leases, the owners had defaulted, and Trinity was obliged to do them over and manage them and try and rent them. They are loft buildings and business buildings of that kind.

"At that time when Mr. Stanton was elected a controller, it was thought best to organize a real estate company which would be wholly owned—but which would have charge of the real estate as distinguished from the general finances of the corporation and many of its religious activities.

"Mr. Stanton was voted both as controller and as president of the real estate corporation, and that was the way it was set up.

"Q. On the basis of your knowledge throughout the years, can you say whether Mr. Stanton did a good job with respect to the properties of Trinity Church?

"A. He did a very good job. Our income was substantially increased by his success in finding tenants for the various buildings.

"Q. I ask you to examine the proviso in the letter set forth in Plaintiffs' Exhibit 1, which refers to Mr. Stanton's release of all claims to pension and retirement benefits not already accrued up to November 30, 1942, and ask you whether you know anything about that proviso?

"A. Yes, it was a more or less technical proviso. We felt that when we discontinued the services of a person, we liked to have a general release.

"The only thing for Mr. Stanton to release was any possible claims he might have—we knew he had none. But we [fol. 33] did not know—from past experience—whether some heir of his might come in and raise a question. For that reason we put that in at the request of the Chairman of the Standing Committee.

"Frankly, I felt it did not mean anything."

Mr. Lee: Would the Court care to examine Exhibit No. 1 at this time? (Handing).

The Court: It seems to me that the paragraph at the foot for signature by Mr. Stanton, was it signed?

Mr. Lee: I frankly do not know, your Honor. This is the original.

There may have been a carbon copy which was signed.

"Q. Is it your opinion that the proviso was surplusage?

"A. Absolutely."

Mr. Rita: I object to it on the ground it calls for a legal conclusion.

The Court: I think the witness' opinion may be of help to the Court.

It is not binding on the Court, I agree.

Overruled.

By Mr. Lee:

"Q. Has Trinity Church been involved in any great amount of litigation?

"A. Yes, we had had an extraordinary amount of litigation involving various heirs, so-called, of various personages claiming to be owners of various portions of Trinity property going back to colonial times, I may say.

"Q. It was necessary to protect Trinity Church legally?

"A. Yes.

"Q. Was it your intention that Mr. Stanton should accrue additional pension benefits on account of such payments?

[fol. 34] "A. No, it had nothing to do with any pension.

"Q. If Mr. Stanton had been paid a salary, would he have accrued pension benefits?

"A. Not unless he continued in the employ of the corporation. When he resigned under the terms of the pension plan, he was only entitled to the return of the money he paid in, or an insurance policy equal to the amount that he paid in.

"At least premiums would have been equal to the amount that he paid in.

"Q. Is it your testimony that the proviso in the resolution, which you say that you put in, was intended to prevent or preclude any claim by any heir of Mr. Stanton's that he was receiving compensation?

"A. Yes, that he might be entitled for some reason or another to something from the pension fund."

Mr. Rita: I object on the ground it calls for a legal conclusion.

The Court: Overruled.

Mr. Lee: Will you read the answer, Mr. Hasler?

"A. Yes, that he might be entitled for some reason or another to something from the pension fund.

"Q. Now, you have testified that Mr. Stanton did a good job for Trinity.

"Now I will repeat the question which was objected to earlier. Was he adequately compensated for what he did, in your estimation?

Mr. Rita: That is objected to on the ground it calls for a conclusion.

The Court: Sustained.

Mr. Hasler: Do I answer, your Honor?

The Court: No, I am sustaining the objection.

Mr. Lee: May I ask the witness now to turn over to page 11 of the deposition at the foot of the page?

The question is:

[fol. 35] "Q. Based upon your knowledge as a director, as a Vestryman, and as counsel, did Alden Stanton give up anything under the proviso of the resolution set forth in Plaintiffs' Exhibit No. 1?"

"A. No."

Mr. Rita: That is objected to on the ground it calls for a legal conclusion.

The Court: I think it does. The objection is overruled. I think it may be of help to the Court.

Mr. Lee: Your honor, that is the end of the—

The Court: Direct and redirect!

Mr. Lee: Direct and redirect of the deposition.

If Mr. Rita cares to read the cross—

Mr. Rita: Mr. Hasler, would you turn to page eight, please.

Mr. Hasler: Yes.

Mr. Rita: The middle of the page there.

Mr. Hasler: Yes.

By Mr. Rita:

"Q. Mr. Sheppard, I would like to ask you what pension rights and retirement rights Mr. Stanton had at the time of his resignation?

"A. Well, I would have to refer to the pension plan. But broadly speaking, the pension plan provided that all people who are members of the pension plan, if they had been an employee of the corporation for a minimum of two years, and at that time they paid or contributed a certain portion of their salary to the plan, and the corporation contributed the rest,—it was all paid to the Chase National Bank as trustee—when they reached retirement age of 65 they could then retire and receive a pension.

"I cannot recall the exact percentages which they were to receive, but it was based on the salaries which they had [fol. 36] received over a period of at least five years, broadly speaking.

"Q. Broadly speaking, can you state what it would amount to at a salary of \$22,500?

"A. It would be more or less of a guess, \$10,000.

"Q. How old was Mr. Stanton when he resigned?

"A. I haven't any idea. Much less than the retirement age, in his early fifties.

"Q. You say that the proviso in the resolution provided that with the discontinuance of his services, the corporation of Trinity Church was released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

"Do you say that was a useless provision?

"A. To my mind, it was.

"Q. Why did you put it in?

"A. Because Mr. Hasler who was Chairman of the Standing Committee felt so many claims were made against Trinity involving Trinity in law suits, that we ought to be protected against a claim even though we knew it could not be successfully prosecuted.

"Q. Then the proviso had some use?

"A. If you call that a use, yes.

"Q. Did Mr. Stanton have any children?

"A. Yes, he had a son."

The Court: Do you intend to read—

Mr. Rita: No, your Honor, I am not going to read it all.

The Court: (Continued)—the question on the middle of page nine, respecting the book entries?

Do you intend to read that?

Mr. Rita: I hadn't planned to, your Honor.

The Court: Well, I will read it:

"Mr. Sheppard, I notice in your letter to Mr. Koch,—I don't know how to pronounce it—"I notice in your letter [fol. 37] to Mr. Koch, in which you say the treasurer informed you, the payments were entered in the books of Trinity Operating Company as a gratuity."

"Were the entries in the corporation of Trinity Church also entered as a gratuity?

"A. Yes."

Mr. Rita: Mr. Hasler, would you drop down to the bottom of page nine?

"Q. You say that you were general counsel for the church?

"A. Yes.

"Q. For how many years?

"A. I still am. The same year that Mr. Stanton was elected controller.

"Q. What year was that?

"A. 1933, or 1934.

"Q. You say you are a trustee of the pension plan of the corporation of Trinity Church, or is it Trinity Operating Company?

"A. Both, trustee of both.

"Q. How many trustees were there?

"A. Three.

"Q. Who were they besides yourself?

"A. Mr. Stanton and I would have to check.

"Mr. Stanton knows better than I do. Mr. Moore, he is dead now.

"Q. You say Mr. Stanton came to work for the corporation of Trinity Church back in 1933, approximately?

"A. About then.

"Q. Do you know what his functions were?

"A. Yes, sir, he was a clerk who had charge of the real estate end of it.

"Q. Do you know what his salary was at that time?

"A. I have no idea.

[fol. 38] "Q. You say that after Mr. Stanton resigned he contributed no further service to Trinity Church or corporation?

"A. Well, I think when we would ask him questions as to something that we were not clear about, he would tell us.

"I don't know whether you would consider this service or not.

"Q. You said on direct examination that Mr. Stanton came in as a witness in a case involving Trinity Church
"Can you state what that was about?

"A. It was a suit brought against the rector which was finally settled. It was highly confidential.

"Q. A suit against the rector?

"What was the name of that suit?

"A. I think Watkins against the Rector. I don't know whether the corporation was made a party or not.

"Davis, Polk handled the case, and Theodore Kiendl.

"Q. What was the title of the case?

"A. Watkins.

"Q. Was the church suing Watkins?

"A. Watkins was suing the church.

"Q. You say that was of a confidential nature?

"A. It was against the rector personally?

"Q. You said on direct examination that you did not know whether the pension was refunded to Mr. Stanton.

"A. Not of my own knowledge. I was informed by the treasurer it was. I did not have anything to do with it.

"I would like to add as a trustee I must have voted with the other trustees to refund the money. I don't recall it. It was too long ago.

"Q. As trustee of the pension plan would Mr. Stanton vote on the return of the pension to himself?

[fol. 39] "A. I don't imagine he would. I think it was more or less automatic.

"These were the provisions of the pension plan and he had resigned. The remaining trustees would handle the matter.

"Q. When did Mr. Watkins leave the employ of the church?

"A. 1942—I think 1942."

The Court: What has that got to do with this?

Mr. Rita: Your Honor, it shows a connection, I believe, with Mr. Watkins and Mr. Stanton.

The Court: What do you mean for an income purpose by a connection?

Mr. Rita: Mr. Watkins was brought into the church by Mr. Stanton.

Mr. Watkins was fired in October, 1942.

Mr. Stanton resigned within three weeks thereafter.
I think that it has some bearing on the case.

The Court: Perhaps you can point it out. Maybe I am more infirm, I suspect.

I see no bearing whatever on the question of whether this was a gratuity or a compensation.

Mr. Lee: If I may say, Mr. Watkins received payments from the church as well. He litigated that question in the tax court. He lost his case in the tax court.

We—Just so that the Court will be informed of the background—we believe the tax court in its opinion clearly distinguished between the Court situation here, and Mr. Watkins'.

We will not make any further objection to Mr. Watkins.

The Court: I am not interested. But if counsel wants me to, I am bound to listen.

Mr. Lee: Right, sir.

[fol. 40] Mr. Rita: I believe the last question was:

"Q. When did Mr. Watkins leave the employ of the church?

"A. 1942—I think 1942.

"Q. In the same month as Mr. Stanton left?

"A. No, I think it was before Mr. Stanton resigned.

"Q. You don't know approximately what month?

"A. No, I think a month or so before.

"Q. Did Mr. Watkins resign?

"A. Mr. Watkins was discharged.

"Q. Did that have anything to do with Mr. Stanton's resignation?

"A. Not that I know of; as far as the corporation was concerned, anyhow."

Mr. Rita: That is all I wanted to ask.

Mr. Lee: That completes our submission of the deposition of Mr. Sheppard, your Honor.

The Court: All right.

Mr. Lee: May I call Mr. Hasler now on his own right?

The Court: Now, will you swear Mr. Hasler, please?

FREDERICK E. HASLER, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Hasler, were you a member of the Vestry of Trinity Church in 1942 at the time that Mr. Stanton resigned?

A. Yes.

Q. Were you a member also of the Standing Committee of the Vestry?

[fol. 41] A. I was Chairman of that.

Q. At that time what was your occupation, Mr. Hasler?

A. Chairman of the Continental Bank and Trust Company.

Q. Chairman of the Board of Directors; is that correct?

A. Yes, sir.

Q. Were you present at the time the resolution was adopted, referred to in Plaintiffs' Exhibit No. 1 (handing)?

A. Yes.

Q. Did you vote on such resolution?

A. I did.

Q. Was there any discussion prior to the voting on such resolution?

A. That is too far back—I would say, yes.

Mr. Stanton was held in very high regard by the members of the Vestry and undoubtedly there was discussion before the meeting, yes.

Q. On the basis of your participation in the Vestry meeting, or the Board of Directors' meeting, which adopted such resolution, and on the basis of your vote—

The Court: You are speaking of the vote of the Vestry of the Church, or the Board of Directors of the Corporation?

Mr. Lee: I should clarify that, if your Honor please. I should have said the Board of Directors of the Trinity Operating Company.

Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the

Board of Directors was at the time of the adoption of that resolution?

[fol. 42] Mr. Rita: I object on the ground that the witness is incompetent to so testify.

The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

Q. Mr. Hasler, this meeting took place in 1942.

Could you possibly recall anything which you or any other member of the Board said at that time?

A. Yes, sir, we were all unanimous in wishing to make Mr. Stanton a gift.

Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

We understood that he was going in business for himself.

We felt that he was entitled to that evidence of good will.

Q. Do you know whether Mr. Stanton had subsequent to the effective date of his resignation—do you know whether he had performed any services for either the corporation of Trinity Church or Trinity Operating Company?

A. Not that I know of.

Q. From the date of Mr. Stanton's resignation, have you been continuously associated with Trinity Church?

A. Yes.

Q. Have you been a vestryman during that period?

A. Yes.

Q. Continuously?

A. Yes. I am now Warden which is distinct from the Vestry.

Q. Are you Junior Warden?

A. Senior.

Q. Prior to Mr. Stanton's resignation, had he been paid in full for all services rendered by him?

[fol. 43] Mr. Rita: I object to that.

The Court: Why?

Mr. Rita: Your Honor, I think that that calls for a legal conclusion.

The Court: Overruled. Of course, he may state whether he was paid for his services.

The Witness: Would you mind repeating the question?

Q. Prior to Mr. Stanton's resignation, had he been paid in full for the services rendered by him?

A. Yes.

Q. After Stanton's resignation had been accepted, and upon the voting on the resolution, did he have any voice in voting on the resolution awarding him \$20,000?

The Court: I think your question is:

Did he participate in the vote?

The Witness: The answer is no.

Q. Do you know of any business purposes which would have been served by obtaining the good will of Mr. Stanton in the business sense of the term?

A. No.

Q. (Continued) Upon his resignation?

Has Trinity Church or Trinity Operating Company, Incorporated, obtained any Federal income tax benefits from the manner in which these payments were treated on its own books?

A. No.

Q. Did Trinity Operating Company or the corporation of Trinity Church withhold any payments to Mr. Stanton for Federal income tax purposes?

A. No.

Q. Did it file any information returns that you know of?

A. Not that I know of.

[fol. 44] Q. Under the terms of the pension plan, as it existed, would compensation or payment for services to Mr. Stanton, require him to make contributions to the plan, if he were a member of it?

A. I understood so, yes.

I was not a trustee of the pension plan, though.

Mr. Lee: No further questions, your Honor.

Cross examination.

By Mr. Rita:

Q. Mr. Hasler, how long have you been associated with the Trinity Operating Company?

A. I became a director when I became a vestryman in '41, I think.

I was a director of the Operating Company until it was dissolved.

Q. When was the operating company dissolved?

A. I can't remember the year now.

Q. Were you familiar with the transactions which occurred during the year 1942, in connection with leaving of the church by Mr. Stanton, Mr. Watkins, and Miss Meade?

A. Would you mind repeating that?

Q. Surely.

I say, were you familiar—

The Court: Just a moment, he will read it.

(The question was read by the reporter.)

The Court: How do you spell that?

The Witness: M-E-A-D-E.

I would like to ask the counsel just what do you mean by "transactions"?

Q. Well, now, the leaving of the church, are you familiar with the background?

[fol. 45] A. As a director of the operating company and vestryman, yes, I would know anything of importance.

Q. I would like to show you Government's Exhibit No. A for identification, which is a copy of the special meeting of the board of directors.

The Court: Do you mean minutes?

Mr. Rita: Minutes of the board of directors of the Trinity Operating Company, of October 14, 1942.

Q. Are you familiar with that, sir?

A. Yes.

Q. You were present at that meeting?

A. I was present.

Mr. Rita: May I have that back, please?

The Witness: (Handing).

Q. It was at that time, was it not, that the question of the discharge of Mr. Watkins came up; is that right?

A. Yes.

Q. Can you tell us why it was that Mr. Watkins was being discharged?

A. To the best of my recollection, it was due to the personality of Mr. Watkins.

A. There was no other reason involving here, his integrity in any way.

Mr. Lee: If the Court please, I would like to object to any further questions concerning Mr. Watkins.

I don't think that it has any relevancy.

The Court: I will be glad to have the Government explain to me what possible light that would throw on the nature of the grant made to this taxpayer.

Mr. Rita: Very well, your Honor.

Mr. Watkins was brought into the employ of the Trinity Operating Company, where he served as treasurer.

The Court: What?

[fol. 46] Mr. Rita: He served as treasurer for some four and a half years.

The Court: Of the operating company?

Mr. Rita: That is correct.

Now, in 1942, Mr. Watkins was discharged for reasons of failing to get along with the tenants, and as I understand it from being charged with dishonesty,

Now, Mr. Watkins, I said, was brought in by Mr. Stanton. When this meeting of October 14th came about, wherein the board of directors resolved to discharge Mr. Watkins, Mr. Stanton opposed this move vigorously.

He took action to expunge the action of the board at that meeting.

He employed the advice of counsel.

The Court: He took action to expunge?

Mr. Rita: That is right.

The Court: What do you mean by that?

Mr. Rita: He suggested the meeting or the minutes of that meeting be expunged.

The Court: And did he succeed?

Mr. Rita: No, he did not.

The Court: He attempted to have it, he didn't take action, he attempted?

Mr. Rita: That is correct.

The Court: Next? Therefore what?

Mr. Rita: Therefore he incurred the resentment of the board of directors at that time.

The Court: Can you imagine people differing without having resentment or is that beyond the capacity of the United States Government representative to understand those things?

Mr. Rita: I merely say—

The Court: All right, next, what is your next reason?

Mr. Rita: Well, the next reason is that he submitted his resignation—

[fol. 47] The Court: You are speaking of Watkins?

Mr. Rita: No, I am speaking of Stanton.

Stanton submitted his resignation within three weeks of the action of the board.

The Court: Therefore what?

Mr. Rita: Therefore I submit that he did not resign under pleasant circumstances as suggested by counsel.

The Court: Therefore what?

Mr. Rita: Therefore, I am suggesting that he is going out under the same circumstances as Watkins went out.

The Court: All right, is that the length and breadth of your argument?

Mr. Rita: That is part of my argument.

The Court: What else is there to it?

Mr. Rita: Well, your Honor, as counsel pointed out previously, Watkins got a payment under a similar provision, almost identical provision.

Mr. Lee: If the Court please, I can't—.

The Court: Now, never mind, I asked him what his theory is, and I am trying to find out what it is.

Mr. Rita: Watkins received a severance payment, and under a—

The Court: And you think that there was a severance payment?

Mr. Rita: That is right.

The Court: Next?

Mr. Rita: Received a severance payment.

The Court: Next; what is the next part of your theory?

Mr. Rita: The measure—

The Court: Because Watkins received a severance payment, therefore, Stanton did, is that it?

Mr. Rita: No, I am trying to point out in the Watkins case this was treated by the Tax Court of the United States as being compensation.

Now, I am pointing—I am trying to point out that if Stanton was separated under similar circumstances, the [fol. 48] distinction upon which counsel relies so heavily, would be knocked out of the case, so to speak.

The Court: I would say, however, in order to develop your theory, is it necessary to go into Watkins' aspects of the matter?

Mr. Rita: I don't think that it will take too long, but I do want to show the similarity.

The Court: Between what?

Between the actions?

If you can show a similarity between the actions as regarded in the minutes, you are on perfectly firm ground.

Mr. Rita: That is right.

The Court: Go right ahead.

Mr. Rita: All right, sir.

Would you please repeat the last question before the colloquy?

The Court: You were referring to the fact that you said that Stanton took action to have reference to Watkins expunged, and he was unsuccessful.

Go on from there.

Q. At the meeting of October 14th, I believe the board took action to have Mr. Watkins discharged; correct?

A. Yes, sir.

Q. I would like to show you a copy of the minutes, the photostatic copy of the minutes of the Board of Directors of the Trinity Operating Company, dated October 28, 1942, marked Government's Exhibit B for identification.

If you please, look at that, sir (handing).

That is a meeting in which you participated in, sir?

A. Yes.

Q. Do you recall any statement made by Mr.—

Mr. Lee: May I see the proposed exhibit?

[fol. 49] Mr. Rita: I am sorry.

May I have it back, please?

The Witness: May I look through it first?

Mr. Rita: Yes, you better look through it first.

The Witness: Your Honor, this is a full meeting. I would take a long time to read the minutes.

The Court: Is there anything you want to call to his attention?

Mr. Rita: I want to bring out Mr. Stanton's remarks about the action taken at the board meeting of October 14, 1942.

Q. Can you tell us what Mr. Stanton said at that meeting?

A. No, it is too far back, but the minutes speak for themselves.

Q. Could you refresh your recollection there, sir?

A. If you wish me to read the minutes—

Q. Just glance at the page marked with the red marker, there, I believe you will find it,—about the middle of the page.

A. As the president stated—it is all down ~~the~~ line here. Which one do you want?

"The president states he would like to give the directors his reaction to the request made at the meeting of October 14.

"He stated that the action was taken without his previous knowledge.

"And it had been a complete surprise to him. That he had since acted under advice of counsel in the matter.

"He states further that such precipitous action would disorganize and disrupt the activity now being carried on.
[fol. 50] "Second, that it would be impossible for the others to properly handle the affairs of the company.

"Third, he considered it unwise and unfavorable to have the treasurer—to peremptorily dismiss him without stating

a reasonable cause after four years and eight months of what he termed remarkable service to the company.

"Four, and without an opportunity to substitute and train new employees, serious financial losses would be sustained."

Do you wish me to go on further?

Mr. Rita: Yes.

The Witness: "In support thereof the president offered evidence to show that the treasurer was held in high taste by the Jennings, and that our labor relations was said to be the finest in this city.

"He stated further that while the treasurer made plans for re-entry into the service, he felt that the effect of this action would be such as to prevent passing the necessary physical tests at that time.

"He stated further that the treasurer had no desire to remain in the employ of this company indefinitely, and that as president he could bring about the change as desired on a mutually agreeable basis if given a reasonable time to work it out.

"The president then recommended that the record of the action taken at the meeting of October 14, be expunged, and that the matter be taken up on the basis of sufficient time being given to re-organize the stock, in order to avoid undue embarrassment either to the company or to the treasurer.

"The question as to the time required was asked and at the time the president stated that while the uncompleted transactions might take until April, it was quite possible [fol. 51] that the treasurer would have rejoined the service prior to that time.

"The matter was discussed at length and resentment was expressed as to the presumptuous suggestion that the action of the board taken after long deliberation should be expunged."

Mr. Rita: That is enough, I think, sir.

The Court: Does that refresh your recollection as to something or other?

You have read from a document, not in evidence, I suppose you realize that?

'Now, the question is: Having read that, is your memory refreshed on a given subject?

What subject do you wish to have him speak about?

Q. Do you recall that, sir?

A. In a general way, I do, yes.

Q. Mr. Stanton was—shall we say—hostile?

Mr. Lee: I object, your Honor.

The Court: Well—

The Witness: No, I will answer his question.

No, Mr. Stanton was never at any time hostile.

He, as president and officer in charge of the operating company naturally was expected to express his opinion.

And as the minutes stated, he did so.

The Court: Next question, please.

Mr. Lee: If Honor please, unless the Court would like for me to—

I would make no objection to this proceeding.

I see no point in any of this line of questioning.

The Court: I have no wish in the matter at all.

Are you offering Exhibits A and B for identification?

Mr. Rita: I offer Exhibit A and B at this time in evidence.

The Court: I understand there is no objection.

[fol. 52] Mr. Lee: I understand there is no objection.

Mr. Lee: No objection.

(The minutes of the meeting of the board of directors of Trinity Operating Company were received in evidence at Exhibit A.)

(The minutes of the meeting of the board of directors of Trinity Operating Company were received in evidence as Exhibit B.)

Q. Mr. Hasler, I show you Government's Exhibit C for identification, which are the minutes of the Trinity Operating Company, of October 30, 1942, and ask you to identify that, sir (handing)?

A. Yes.

Q. Were you present at that meeting?

A. I was, yes.

Q. Is that the meeting that Mr. Stanton tendered his resignation?

Mr. Lee: Your Honor, I will stipulate to any minutes that Mr. Rita would like to introduce, or may be introduced, without the necessity of identifying them.

Mr. Rita: May I have that exhibit back, Mr. Hasler?

The Witness: Yes (handing).

The Court: No objection!

Mr. Lee: No objection.

Mr. Rita: I should like to offer in evidence, pursuant to the stipulation of counsel, as Government's Exhibit C, the minutes of the Trinity Operating Company, dated October 30, 1942.

The Court: Exhibit C.

(Defendant's Exhibit C in evidence, additional minutes.)

[fol. 53] Mr. Rita: I would like to offer Exhibit D, the minutes of the Trinity Operating Company, dated November 5, 1942.

(Defendant's Exhibit D in evidence, additional minutes.)

Mr. Rita: I offer in evidence, Government's Exhibit E, which is a copy of the minutes of Trinity Operating Company of November 19, 1942.

(Defendant's Exhibit E in evidence, additional minutes.)

Mr. Rita: Government's Exhibit F, which is a copy of the minutes, of the Trinity Operating Company, dated November 23, 1942, offered in evidence.

(Defendant's Exhibit F in evidence, additional minutes.)

Mr. Rita: I offer as Government's Exhibit G, the minutes of the Trinity Operating Company, dated December 28, 1942.

Mr. Lee: No objection.

(Defendant's Exhibit G in evidence, additional minutes.)

Mr. Rita: The last, I offer Government's Exhibit H, which is a copy of the minutes of the Trinity Operating Company, January 8, 1943.

Mr. Lee: No objection.

The Court: Is there any reference to the action taken with regard to the taxpayer Stanton in any of those minutes?

Mr. Rita: Yes.

The Court: Anything to contradict what thus far has been shown as to the nature of it?

Mr. Rita: I think it shows the similarity between the resolutions. It gives a fuller picture, your Honor, of what [fol. 54] transpired as to the month of October and November of 1942.

The Court: I will try again.

I want to ask a clear question.

Mr. Rita: Yes.

The Court: Is there anything in any of the minutes that you offered in evidence that tends to show that the nature of the grant which was made to Stanton was other than has been heretofore stated?

Mr. Rita: I think so.

The Court: You do?

Mr. Rita: Yes.

The Court: Just read it to me, please, into the record.

Just the part that you say contradicts or is inconsistent with what has already been shown concerning the Stanton grant.

Mr. Rita: Your Honor, I will read from Government's Exhibit D, second page:

"Resolved to accept the resignation of the president and his secretary as of November 30, 1942, and that a committee be appointed to consider compensation to Mr. Stanton and Miss Meade in appreciation of their past services."

I think that that is sufficient to show that is certainly not thought of in the terms of a gift.

The Court: Well, at that time, certainly, that would be consistent with a plan having in view compensation.

What happened to that committee's deliberations?

How were their deliberations put into final form?

Mr. Rita: Their deliberations were put into final form by attachment of the proviso.

The Court: By the what?

Mr. Rita: Attachment of the proviso at the end of the resolution.

[fol. 55] In other words, in consideration of the waiver I think that is consistent, your Honor.

The Court: Now, that, of course, is separate from your theory that the way that Watkins was treated, throws light on the way that Stanton was treated.

Mr. Rita: That is true.

The Court: Those are two separate ideas.

Go ahead.

Mr. Lee: May we have for the record the date of what Mr. Rita just read?

Mr. Rita: Exhibit D, November 5th.

The Court: 11/5/42.

Mr. Rita: That is correct.

The Court: What was the date of the adoption of the resolution that had to do with Stanton?

The Witness: October 28th.

Mr. Rita: October 30th, '42, Stanton's resignation.

Mr. Lee: The resolution.

Mr. Rita: November 19, 1942.

The Court: That is two weeks after November 5th.

Did you ever hear of people changing their minds in a period of two weeks?

Mr. Rita: That is part of the statement, your Honor.

The Court: All right, go ahead.

Q. Mr. Hasler, you are familiar with the operations of the Trinity Operating Company with respect to people leaving its service, is that correct?

A. The Trinity Operating Company doesn't exist now.

Q. I know, but in those years?

A. While I was a director, I would know of important changes in the personnel. But of the minor ones, no.

Mr. Rita: Where is Plaintiffs' Exhibit No. 1?

The Court: Exhibit 1 is the letter, Stanton to Belnap, isn't it?

[fol. 56] Mr. Rita: The resolution letter, I believe.

The Witness: It is a letter from Belnap, sir.

Q. Mr. Hasler, at the bottom of that resolution it says provided that Stanton releases all the pension rights; is that right?

Mr. Lee: I object to that, your Honor; that is a most unfortunate phrasing.

The Court: Well, if I hadn't seen it, I might be misled. I read the paper. I called attention to it a few minutes ago, the fact that the paragraph at the foot is not signed. What is your question, please?

Q. I am asking you, is that a usual provision attached to any person leaving the church?

A. So far as I know, I can't remember any similar case.

Q. How about Harris Watkins?

A. Watkins is entirely different.

Q. But he had a similar provision, isn't that correct?

A. I can't answer that. The resignation of Mr. Stanton was entirely different from the reasons that we asked the resignation of Mr. Watkins.

Q. Mr. Stanton was a special case, is that right?

A. Mr. Stanton was a special case.

He had thought for several months before his resignation, of going into business for himself.

While he did object to our asking for the resignation of Mr. Watkins, which he had a perfect right to do, and we respected his opinion, it has had nothing whatever to do with what we did for Watkins, and what we did in making Mr. Stanton a gift.

Q. Did you testify at the Tax Court trial of Mr. Watkins, by any chance?

[fol. 57] A. No.

Q. You did not?

A. Mr. Watkins was not a gift, it was a severance allowance, if my memory is correct.

Am I right?

Q. I believe the contention was that it was a gift.

Mr. Lee: If the Court please, I object to characterizing a lawsuit to a witness in the form of a question.

The Court: It is not a convincing way of proving anything, I suppose you know that.

Please continue with your cross-examination.

Mr. Rita: Yes, sir.

I have nothing further of this witness.

Mr. Lee: I have one question.

Redirect examination.

By Mr. Lee:

Q. Mr. Hasler, was the \$20,000 paid to Mr. Stanton paid pursuant to the resolution, a copy of which is set forth in Plaintiffs' Exhibit No. 1?

A. Yes.

Q. Was that resolution ever rescinded?

A. No.

Mr. Lee: No further questions.

Mr. Rita: No further questions.

I call on Mr. Stanton.

ALLEN D. STANTON, a plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Stanton, are you the plaintiff in this action?

A. I am.

Hol. 58] Q. I show you a letter dated December 31, 1942, and ask you whether you received that letter (handing)?

A. I did.

The Court: December 31, '42?

Mr. Lee: Yes, your Honor.

Q. Who it is signed by, if you know?

A. Signed by A. Elliott Bates, acting controller of Trinity Church.

Mr. Lee: I offer it in evidence as Plaintiffs' Exhibit 4.

Mr. Rita: No objection.

(Letter of December 31, 1942, received in evidence as Plaintiffs' Exhibit 4.)

Q. Plaintiffs' Exhibit No. 4, states that under the Trinity Parish Retirement Plan, you had contributed \$1,590.

Did you receive that back from the retirement plan?

A. I did.

Q. It states further that you had contributed \$594.37 to the Trinity Operating Company Retirement Plan.

The Court: How much was that, please?

Mr. Lee: \$594.37, your Honor.

Q. Did you receive that back?

A. I did.

Q. Did you receive anything from either of the two retirement plans, except or in addition to the contributions which you had made?

A. No.

Q. I show you a letter dated January 22, 1943, and ask you whether you received the letter and recognized the signature? (Handing).

A. I received it, and I recognize the signature is that of Admiral Belnap.

[fol. 59] Mr. Lee: I offer it in evidence as Plaintiffs' Exhibit No. 5.

Mr. Rita: I object to it, as hearsay.

The Court: Let me see it, please.

(Handing document up to the Court.)

The Court: Of course, I don't know what this means, and why it is deemed to be relevant.

Mr. Lee: We are offering it, your Honor, to show the way the corporation viewed the payment at approximately the time it was made which bears—

The Court: With Admiral Belnap speaking for the corporation, or was that an expression of his view?

Mr. Lee: Well, perhaps I better ask the witness.

Q: What was Admiral Belnap's position at that time, January 21, 1943?

A. Well, Admiral Belnap succeeded me as the president of the operating company, and I think as acting controller pending the election of another controller.

I can't state exactly which of the positions he held at that date, that being a month and a half or so later.

Mr. Lee: It might obviate my adversary's objection if I limit the purpose of this offering merely to show Trinity Church had been advised by counsel that it was to be treated as a gift, and not Admiral Belnap's opinion at all.

The Court: With that limitation, do you withdraw your objection?

Mr. Rita: Your Honor, it seems to be hearsay to me.

The Court: I will sustain the objection.

I don't think that it tends to resolve any of the issues in the case, if there are any.

Q. Mr. Stanton, at the time that your resignation became effective, did Trinity Church or Trinity Operating Company owe you any money?

A. No.

[fol. 60] Mr. Rita: I object to it, it calls for conclusion.
The Court: Overruled.

Q. Did you participate in any manner in the voting of this amount of money to you?

A. None whatsoever.

Q. Were you physically present when it was voted?

A. No.

Q. Subsequent to the effective date of your resignation, did you perform any services on behalf of the corporation of Trinity Church or on behalf of any of its subsidiary corporations?

A. I think that I appeared once as a witness in a lawsuit. I don't remember just what it was. It was a lawsuit.

The Court: Well, that might or might not be a service to the corporation.

Did you render any services other than to obey a subpoena.

The Witness: I was subpoenaed—no, and that is the only service, if any, that I ever rendered after that—after my resignation became effective, that is what I mean.

Q. Prior to the time of the adoption of the resolution in question, did you know that the resolution was to have been presented?

A. I hadn't heard anything about it. I was completely surprised by it.

Q. Upon your finding out the resolution had been adopted, did you consider the payment to be a gift?

A. I did.

Mr. Rita: I object to that as a conclusion.

The Court: Is that relevant?

Mr. Lee: I believe it is, your Honor.

[fol. 61] The Court: It shows that he treated it as a gift by failing to report it in his income!

Mr. Lee: No, your Honor, under the cases cited in—

The Court: Are there cases on it?

All right; I will allow him to say how he considered it.

The Witness: I answered it, my answer was that I did.

The Court: You did consider it a gift?

The Witness: I did.

Q. Were you discharged from your position with Trinity Church or Trinity Operating Company?

A. I was not.

Q. Did you resign?

A. I did.

Q. Was any pressure put upon you to resign?

A. None whatsoever.

Mr. Lee: If the Court please—it may save some time if it satisfies Mr. Rita—our motion for summary judgment; Mr. Stanton's affidavit, if that could be deemed as direct testimony, I will turn him over to cross-examination.

If it be deemed to be copied into the record, I will let the Government cross-examine.

The Court: You will have to ask him. I can't answer the question.

Mr. Lee: If you will stipulate the affidavit of Mr. Stanton submitted before the motion for summary judgment be copied into the record as the remaining direct testimony, then you may cross-examine.

Mr. Rita: If you would like to read it, read it, but I object.

Mr. Lee: This testimony will be repetitive of what we have already in the record.

I feel that it might come from the plaintiff as well.

This is a denial of our motion for summary judgment.
[fol. 62] Judge Abruzzo thought we should put the witness on the stand.

The Court: If there is anything in the affidavit that you have not covered on the witness' direct examination then why don't you go right to that without reference to the affidavit?

Q. Were you paid \$20,000 by Trinity Church and Trinity Operating Company subsequent to the effective date of your resignation?

A. I was.

Q. What was your position with Trinity Church and Trinity Operating Company.

The Court: When?

Q. At the effective date of your resignation?

A. I was controller of Trinity Church, and president of the Trinity Operating Company.

Q. Were you ever a vestryman or a warden of Trinity Church?

A. I was not.

Q. During your employment by Trinity Church, what in general were your functions?

A. Well, my functions in the church itself, were, as you might say, treasurer.

I had charge of all the financial transactions, the responsibility for all moneys, and properties.

I was the only one in the institution who could sign a check for anything.

Q. Well, in general, did you have anything to do with the real estate owned by Trinity Church?

A. All real estate was under my charge. The physical upkeep of the church building was in my charge.

But the principal business was to earn money to support the church from its income from real estate.

The Court: The title of your office in the church was controller?

[fol. 63] The Witness: Controller.

Q. What was your salary in 1942?

A. At the time I resigned, I was receiving \$22,500 a year.

But between the two, I have forgotten how it was split. It added up to that.

Q. Was such a salary paid to you in full through the effective date of your resignation?

A. It was.

Q. Did the Vestry or the Board of Directors know of your resignation prior to your submitting it?

A. Not until I presented it at the meeting.

Q. Did you ask for anything in return for your resignation?

A. Nothing.

Q. Did you receive anything in return for your resignation?

A. Nothing.

Mr. Rita: I object to the last question.

The Court: Overruled.

Q. Subsequent to the effective date of your resignation, was there any restriction whatever on any business activity which you might conduct?

A. None whatever.

Q. Did you in fact do anything or refrain from doing anything by reason of your former employment with Trinity Church?

A. No.

Q. At the time that you filed your tax return for the years 1942 and '43, did you include the \$20,000 paid to you in your gross income as compensation?

A. I included \$2,000 in the report for 1942, and \$18,000 in the report for 1943 because it was split up for the two years.

Q. But did you call it income?

[fol. 64] A. I included it as a gift.

The Court: You reported it as a gift?

The Witness: I reported it as a gift.

Mr. Lee: No further questions.

Cross examination.

By Mr. Rita:

Q. Mr. Stanton, there has been some testimony about this letter of December 29th, Plaintiffs' Exhibit No. 1, in which there is a phrase at the bottom of the resolution, whereby you waived certain rights; is that correct?

A. Yes.

Q. You signed that letter; is that right, sir?

A. I signed a letter.

The Court: I think the paragraph speaks for itself.

Mr. Rita: Your Honor, it is not signed.

The Court: I understand that, but you talk about waiving rights.

I have read the paragraph. I think it speaks for itself.

Mr. Rita: All right.

The Court: Are you going to ask the witness whether he signed that paragraph or any copy of the letter?

Q. Did you sign that letter, sir?

A. I am sure that I signed a letter with that in it.

Q. Do you remember when you signed the letter?

A. I don't know whether it was in December or January. It was after I severed my connections, I remember. It is pretty far back.

Q. Do you recall that the letter was dated December 29th?

[fol. 65] A. As of approximately that date; I think that is when they started paying me.

I think that I signed it, and sent back a letter of acknowledgment. I don't know—I would say it was within a matter of days of the date of the letter.

Q. In other words, you sent it back and then you got payment; is that right?

A. Whether I got the payment with it or after, I do not know.

Q. Do you know when the first payment started?

A. I think the end of December, they paid me for the first time. That is for the month of December, paid me at the end, somewhere, I don't know what date, maybe the 30th or the 29th. I don't recall.

Q. Mr. Stanton, how well did you know Mr. Watkins?

A. How long?

Q. How long?

A. Very well.

Q. Did you bring him into the firm?

A. In a sense, yes.

Q. The corporation?

The Court: There isn't any firm involved here.

You are a lawyer, and you are supposed to be precise.

Do you mind?

Did you bring him into the employ of either corporation?

The Witness: I employed him as a treasurer of the Trinity Operating Company.

Q. Will you tell the Court, in your own words, the background of Mr. Watkins' dismissal from the corporation?

A. I think that that is in the record. The dismissal was brought about at a meeting of which I had been given no notice.

[fol. 66] But inasmuch as the entire membership of the committee was there, it was a legal meeting. As I remember it, they just transacted one piece of business. They adopted a resolution requesting me to dismiss him.

Q. What action did you take thereafter, sir?

A. I sought advice of counsel, and got it.

I didn't do anything about it because I was in a position where I had a responsibility to try, which I didn't feel that I could carry out if I lost Watkins' services suddenly.

Q. Why did you seek the advice of counsel?

Mr. Lee: I object, your Honor. I think this is wholly beside the point.

The Court: I can't think of anything further beside the point, but you know the attitude of the United States when it sees a penny of income taxes that it could grasp.

Now, just let him alone.

Mr. Lee: All right.

The Witness: May I complete the answer?

Q. If you please.

A. Well, I had the entire responsibility for what was going on. I was in some very critical negotiations.

I asked counsel whether I was justified in employing Watkins to complete the negotiations he had started. For instance, he was carrying on a very important negotiation in Washington.

The Court: You received advice?

The Witness: I received advice that I not only had the right to do it, but I had the duty to do it, to hire and use anybody that I thought was necessary to carry on, so I did.

I went on and for a couple of weeks I used Mr. Watkins in a rush situation.

[fol. 67] Q. When did you resign from this corporation, when did you decide to resign from this corporation?

A. I don't remember.

Q. Shortly thereafter, was it?

A. I did resign shortly thereafter, but not—I should say when I decided that I would resign, I think I decided long before that, that I would resign.

Q. You took Mr. Watkins' side in this dispute?

A. I took Trinity's side in it.

Q. Could you tell us why you desired to have the minutes expunged of the minutes of the meeting of October 14th.

A. For the reasons stated in those minutes.

Q. You were a witness at the tax court trial of Mr. Watkins?

A. I was there. I don't remember whether I testified or not.

Q. Mr. Stanton, after leaving the employ of Trinity Operating Company, and the Trinity Church, what did you do then?

A. Well, temporarily I occupied an office in the building downtown. I forget what it was, Pine Street, I guess; and sat about deciding what I would do.

I think that it was two or three months later that a group of us bought a war plant, a machine shop or machine tool business, and carried that out throughout the war—subsequently dissolved it.

Q. After you dissolved it, what business did you take up?

A. Well, I have dabbled in real estate since, I have not been exactly as active as I used to be.

I am not as young as I used to be.

My interests are in real estate—continued to be. I am becoming more active now than I had for some time.

[fol. 68] Q. Mr. Stanton, after leaving the employ of the church, did you ever furnish any advice to the corporation?

A. I don't remember as having done so. We may have been asked questions, but I don't think that it was anything serious.

Q. Were you ever impleaded in any court action?

A. I believe I was. I think that I was impleaded as a co-defendant in a case that was brought against the Rector.

Q. What was the nature of that?

A. I don't know. I just went there. I never knew what the case against the Rector was, except that this man, Major Watkins, had brought suit against the Rector for certain commissions.

I didn't stay. I wasn't present at the trial. They decided that they would not use me at all.

Q. Did you have a secretary at the corporation named Florence D. Meade?

A. Yes, sir..

Q. Was she employed there as long as you were?

A. No.

Q. She was not?

A. No.

Q. Did she leave under the same conditions as you did?

A. She resigned when I resigned.

Q. She did?

A. Yes.

Q. Did she receive the same type of payment from the corporation?

A. Well, the resolution was worded—

The Court: Just a minute, please.

The Witness: I beg your pardon?

[fol. 69] The Court: Well, one of the debatable questions is whether the use of the word "payment" is correct.

I think that your question is, was there a resolution adopted by the board of either corporation or a gift or

a payment, by either corporation, similar to the one that affected you, as to her?

I don't know what it has to do with this case, but if you ask the question, I will ask for an answer.

Mr. Rita: I withdraw that question.

No further questions.

Mr. Lee: If Mr. Rita will stipulate the only question before this Court is the nature of the payment, then we will rest, your Honor.

The Court: Well, I thought that that was agreed to at the outset.

Mr. Lee: That is my understanding. I just want to make certain that I understood that it is entirely correct.

Mr. Rita: That was understood at the beginning.

Mr. Lee: Very well, the plaintiff rests.

Mr. Rita: Defendant rests.

The Court: At the conclusion of the taking of testimony in this case, the Court makes the following finding of fact:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen D. Stanton, in the amount of \$20,000 payable to him in monthly installments of \$2,000 each, commencing with the month of December, 1942, con-[fol. 70] stituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943.

Does that cover the case?

Mr. Lee: It does, your Honor.

The Court: If additional findings are needed, settle.

Mr. Lee: Thank you, your Honor.

The Court: Of course, you will submit a judgment embodying the results of the findings.

Mr. Lee: Yes.

The Court: And that also is to be settled.

[fol. 71]

IN UNITED STATES DISTRICT COURT**JUDGMENT—November 5, 1958**

The Court having considered the evidence and the arguments of counsel and having entered its findings of fact and conclusions of law herein, it is in conformity therewith:

Ordered that the plaintiffs have judgment against the defendant for the principal sum of Fifteen Thousand Fifty-Six Dollars and Twenty-Nine Cents (\$15,056.29) with interest thereon at six per cent according to law.

Mortimer W. Byers, United States District Judge.

Dated: Brooklyn, N. Y. November 5, 1958.

[fol. 72]

EXHIBIT 1

[Letterhead omitted]

December 29, 1942

Mr. Alden D. Stanton, Late President,
Trinity Operating Company, Inc.
1 Cedar Street,
New York, N. Y.

MY DEAR MR. STANTON:

I take pleasure in communicating to you the following resolution recorded in the minutes of the meeting of Trinity Operating Company, Inc. of November 19, 1942:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate

and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 73] May I ask that you indicate your acceptance on the terms stated in the resolution by signing the release written below in a duplicate of this letter.

With kind regards and best wishes, I remain,

Sincerely yours,

TRINITY OPERATING COMPANY, INC.

REGINALD R. BELKNAP,

President.

RRB/n
Encl.

NEW YORK, N. Y. December 29, 1942

I hereby accept the specified sum of \$20,000.00 to be paid in equal monthly instalments of \$2,000.00 each for a period of ten months beginning December 1, 1942 and hereby give full and final release from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 74]

EXHIBIT A**MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.**

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held at the office of the Rector of Trinity Church, #74 Trinity Place, in the City of New York on October 14, 1942 at 4:40 P. M.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Hasler, Booth, Bayne and Outerbridge, constituting the entire directorate, and Mr. Shepard of counsel.

The President acted as Chairman of the meeting and also as Secretary. All of the Directors verbally waived notice of the meeting and the President was requested to prepare a written Waiver of Notice of the Meeting, which when signed shall be filed with the minutes of this meeting.

Upon motion of Mr. Booth, seconded by Mr. Davies, and unanimously carried, it was

RESOLVED that the President be asked to terminate the employment of Mr. Harris W. Watkins as Treasurer by resignation or otherwise forthwith, and that the question of severance pay be left to the President and Mr. Hasler for determination with power.

There being no further business, upon motion duly made, seconded and carried, the meeting adjourned.

s/ **ALDEN D. STANTON,**
Secretary pro tem.

[fol. 75]

EXHIBIT B

MINUTES OF MEETING OF BOARD OF DIRECTORS OF TRINITY OPERATING COMPANY, INC.

A special meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President at 74 Trinity Place, in the City of New York, at 3:30 P.M. on October 28, 1942.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Hasler, Booth, Bayne and Outerbridge, constituting the entire directorate, the Secretary and Mr. Shepard of Counsel.

The President read the minutes of the meeting of October 14, 1942, and

Upon motion duly made, seconded, and unanimously carried, it was

RESOLVED to approve the minutes of the meeting of October 14, 1942 as read.

The President then stated that he would like to give the Directors his reaction to the request made at the meeting of October 14th. He stated that the action was taken without his previous knowledge, and had been a complete surprise to him; that he had since acted under advice of Counsel in the matter.

He stated first, that such precipitate action would disorganize and disrupt the activities now being carried on; second, that it would be impossible for the two other executives to properly handle the affairs of the company; third, that he considered it unwise and unfair to the Treasurer [fol. 76] to peremptorily dismiss him without stating a reasonable cause after four years and eight months of what he termed remarkable service to the company; fourth, that without an opportunity to substitute and train new employees, serious financial losses would be sustained.

In support thereof, the President offered evidence to show that the Treasurer was held in high esteem by tenants and that our labor relations were said by the Union to be the finest in this city. He stated further, that, while the Treasurer had made plans for re-entry into the Service, he felt that the effect of this action would be such as to prevent his passing the necessary physical tests at this time.

He stated further that the Treasurer had no desire to remain in the employ of this company indefinitely and that, as President, he could bring about the change desired on a mutually agreeable basis if given a reasonable — to work it out.

The President then recommended that the record of action taken at the meeting of October 14th be expunged, and that the matter be taken up on the basis of sufficient time being given to reorganize the staff, in order to avoid undue embarrassment either to the Company or to the Treasurer.

The question as to the time required was asked and the President stated that, while the uncompleted transactions might take until April, it was quite possible that the Treasurer would have rejoined the Service prior to that time.

The matter was discussed at length and resentment was expressed as to the "presumptuous" suggestion that the action of the Board, taken after long deliberation, should be changed.

Mr. Hasler stated that he had discussed with the President the question of severance pay, but that he had suggested no basis, and the President stated that if the Treasurer had committed any act warranting immediate dismissal, no question of severance pay would be involved.

The President was directed to proceed with the carrying out of the resolution adopted at the meeting of October 14, 1942 to terminate the employment of the Treasurer. The Treasurer was to be given an opportunity to resign if he desired to do so.

* * * * *

s/ FLORENCE D. MEAD,
Secretary.

[fol. 78]

EXHIBIT C**WAIVER OF NOTICE OF MEETING OF DIRECTORS****MINUTES OF THE MEETING OF BOARD OF DIRECTORS**

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President, 74 Trinity Place, in the City of New York, at 4 P. M. on October 30, 1942.

Present: The President, Messrs. Stickney, Belknap, Davies, Davis, Booth and Bayne; the Secretary and Mr. Shepard of Counsel. Mr. Outerbridge had asked to be excused.

The President acted as Chairman of the meeting and the Secretary of the Company acted as secretary.

Proof of Notice was presented by the Secretary.

A Waiver of Notice of the meeting was signed by all members present.

The minutes of the meeting of October 28, 1942 were presented, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to dispense with the reading of the Minutes of the Special Meeting of the Board of Directors held on October 28th, 1942.

The President stated that he had advised the Treasurer of the suggestion of the Board, made at its meeting of October 28th, and had outlined to him the proposal that he resign as of October 31st, and further that his salary would continue for six months beginning November 1st.

The President then stated that the Treasurer had refused to resign as of October 31st, 1942.

[fol. 79] The President asked if the suggestion to pay salary for six months period was contingent upon the Treasurer's resigning and stated that he would like to have

instructions as to what, if anything, should be paid after the Treasurer's dismissal on October 31st.

After a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

~~RESOLVED~~ that the President be authorized to pay to Mr. Harris W. Watkins, monthly, an amount equal to his salary for a period of six months beginning November 1, 1942, in appreciation of his past services; provided that, with the discontinuance of his services the Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31st, 1942.

(See correction minutes of meeting of Dec. 28, 1942.)

The President stated that in order to avoid any such embarrassment or question at anytime as to the willingness on the part of the President or the Secretary to resign if the Board so desired, the resignations of these two officers had been placed in the hands of the Secretary.

After a discussion, and

Upon motion duly made, seconded and carried, Mr. Booth dissenting, it was

~~RESOLVED~~ that the resignations of the President and the Secretary be laid on the table.

The President then asked that consideration be given to the question of authority to reorganize the office staff.

[Vol. 80] The matter was discussed, and it was the consensus of opinion that the President has authority to do such things as are necessary and that he should act under it.

There being no further business to come before the Board, upon motion duly made, seconded and unanimously carried, the meeting adjourned.

FLORENCE D. MEAD,
Secretary.

[fol. 81]

EXHIBIT D**MINUTES OF MEETING OF BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.**

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President, 74 Trinity Place, in the City of New York, at 4:30 P. M. on November 5, 1942.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Bayne, Hašler, the Secretary and Mr. Shepard of Counsel.

The President acted as Chairman of the meeting and the Secretary of the Company acted as secretary.

Proof of Notice of the meeting was presented to the meeting by the Secretary.

A Waiver of Notice of meeting was signed by all Directors present.

The minutes of the meeting of October 30th, 1942 were presented and after a discussion,

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the Special Meeting of the Board of Directors held on October 30, 1942 be approved as corrected.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the resignations of the President and Secretary be taken off the table.

The President then read these resignations to the meeting, and

Upon motion duly made, seconded and unanimously carried, it was

[fol. 82] **RESOLVED** to accept the resignations of the President and the Secretary, as of November 30, 1942, and that a Committee be appointed to consider com-

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pensation to Mr. Stanton and Miss Mead in appreciation of their past services.

The President then asked that consideration be given to the question of reorganizing the staff and, after a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to appoint as the Committee above authorized, Messrs. Belknap, Davis, and Davies, and that this Committee be asked to take the necessary steps to investigate and interview applicants to succeed the present officers, with a view to reorganizing and reestablishing the organization, and to report back to this Board.

There being no further business, upon motion duly made, seconded and unanimously carried, the meeting adjourned.

*s/ FLORENCE D. MEAD,
Secretary.*

[fol. 83]

EXHIBIT E

MINUTES OF SPECIAL MEETING OF DIRECTORS OF TRINITY OPERATING COMPANY, INC.

The adjourned meeting of the Board of Directors of Trinity Operating Company was held on November 19, 1942 at 4 P. M. in the office of the President, 74 Trinity Place, New York.

Present: The Rector, the President, Messrs. Belknap, Davis, Bayne, Davies, Hasler, the Secretary and Mr. Shepard of Counsel.

Messrs. Booth and Stickney asked to be excused.

The President presided as Chairman of the meeting.

Notice of Meeting was presented by the Secretary and a Waiver of Notice of Meeting was signed by all members present.

The minutes of the meeting of November 5, 1942 were read, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on November 5, 1942 be approved as read.

The Chairman then read a letter addressed by Mr. Stickney to Miss Mead, under date of November 9th, acknowledging the receipt of the minutes of the meetings of the Board of Directors of October 14th, 28th and 30th, and of November 5th, and adding that several parts of the minutes are not at all in accordance with his recollection of what took place.

It was the consensus of opinion that the Secretary should obtain from Mr. Stickney a statement as to the particular minutes referred to by Mr. Stickney.

The Chairman then read a letter which had been addressed by Mr. Booth to the Secretary under date of [fol. 84] November 9th, in which Mr. Booth stated that the memorandum of notes taken by the Secretary did not seem clear and were of a more or less disconnected character. This letter was received.

The President then read the following letter which had been addressed by him to the Trinity Operating Company, Inc.

November 9, 1942.

Trinity Operating Company, Inc.,
74 Trinity Place,
New York, N. Y.

GENTLEMEN:

Inasmuch as a question was raised by a Vestryman of Trinity Church as to the value of the stock accepted in payment of rent due from Standard & Poor's Corporation, and notwithstanding the fact that,

First: At the time of this adjustment, Mr. Paul T. Babson paid in cash \$100. per share for 1,000 shares of the same stock, and

Second: The fact that Standard & Poor's Corporation has earned the dividends due on this stock,

I have returned to the Trinity Operating Company, Inc. \$722.16, representing the amount of profits distributed to the officers under their contracts on the reserve set up by Patterson, Teelé and Dennis, Accountants, against this stock.

Very truly yours,

(signed) ALDEN D. STANTON,
President."

[fol. 85] The President then stated that a vacancy existed in the Directorate due to the resignation of Mr. Frank R. Outerbridge and called for nominations.

Mr. J. Taylor Foster was nominated, and there being no further nominations,

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that Mr. J. Taylor Foster be elected as Director of the Trinity Operating Company, Inc.

The Chairman then stated that his resignation as a Director had been presented, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the resignation of Mr. Alden D. Stanton as a Director be accepted as of November 30th, 1942.

The Chairman then stated that he had received the resignation of Mr. Hance C. Hamilton, Personnel Manager of the Trinity Operating Company, Inc.; that he had arranged with Mr. Hamilton to remain until November 30th, and had agreed to pay him two weeks salary beginning December 1st, 1942, in appreciation of his services to the company.

The meeting then recessed and the President and the Secretary retired from the meeting.

During this recess the Report of the Special Committee was discussed and the Rector entered the meeting.

The Chairman of the Special Committee stated that it made the following recommendations:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of the Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942, and

WHEREAS Miss Florence D. Mead has resigned from all positions and offices held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS such resignations have been accepted to be effective as of November 30, 1942;

BE IT RESOLVED that, in appreciation of the services rendered by Miss Mead throughout nearly ten years, a gratuity of three thousand dollars is hereby awarded to her, payable in monthly instalments of \$300. each commencing with the month of December 1942; provided that with the termination of her services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 87] Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to approve the recommendations of the Special Committee as above stated.

There being no further business, upon motion duly made, seconded and unanimously carried, the meeting adjourned until Monday, November 23rd, 1942, at 2:30 P. M.

FLORENCE D. MEAD,
Secretary.

At a meeting of the Board of Directors of the Trinity Operating Company, Inc., held on January 8th, 1943, the following corrections in the above minutes were authorized:

"RESOLVED that corrections be made in the minutes of the meeting of the Board held on November 19th, 1942, to show the following:"

It was reported resignation as a Trustee under the Pension Plan of the Trinity Operating Company, Inc. had been received from Mr. Alden D. Stanton, such resignation to be subject to the pleasure of the Board of Directors.

It was also reported resignation as Secretary of the Pension Plan of the Trinity Operating Company, Inc. had been received from Miss Florence D. Mead, such resignation to be subject to the pleasure of the Board of Directors.

Upon motion duly made, seconded and carried, it was

RESOLVED that the resignation of Alden D. Stanton as Trustee of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942.

[fol. 88] RESOLVED that the resignation of Florence D. Mead as Secretary of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942.

I hereby certify that the foregoing are true and correct corrections to the minutes of the meeting of the Board of

Directors of the Trinity Operating Company, Inc. held on November 19th, 1942, which corrections were authorized by the Board at its meeting held on January 8th, 1943.

P. A. M. Crouch,
Secretary.

[fol. 89]

EXHIBIT F

MINUTES OF MEETING OF BOARD OF DIRECTORS.

The adjourned meeting of the Board of Directors of Trinity Operating Company, Inc. was held on Monday, November 23rd, 1942 at 2:30 P.M. in the office of the President, 74 Trinity Place, New York.

Present: The Rector, the President, Messrs. Belknap, Davis, Davies, Stickney, Booth, the Secretary and Mr. Shepard of Counsel.

The President presided as Chairman and the Secretary acted as secretary of the meeting.

Notice of Meeting was presented by the Secretary and a Waiver of Notice was signed by those Directors present.

The minutes of the meeting of November 19th, 1942 were presented and the Chairman read these minutes to the Board.

Upon motion duly made, seconded and unanimously carried, it was:

RESOLVED that the minutes of the meeting of the Board of Directors held on November 19, 1942 be approved as read.

Reference was made to the letter written by Mr. Stickney under date of November 9th, 1942 regarding the minutes of previous meetings, and Mr. Stickney suggested that in the minutes of the meeting of October 28th, 1942 the following paragraph be expunged:

"It was the consensus of opinion that no further action should be taken but that the Treasurer's resignation should be effective as of October 31, 1942; that

his duties should cease as of that date, and further that an offer be made to pay his salary for six months beginning November 1st."

[fol. 90] and that the following be substituted therefore:

"The President was directed to proceed with the carrying out of the resolution adopted at the meeting of October 14, 1942 to terminate the employment of the Treasurer. The Treasurer was to be given an opportunity to resign if he desired to do so."

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on October 28th, 1942 be amended in accordance with Mr. Stickney's suggestion as above outlined.

Mr. Stickney further suggested that consideration be given to the following statement in the minutes of the meeting of the Board of Directors held on October 30th, 1942:

"The President stated that he had advised the Treasurer of the offer of the Board, made at its meeting of October 28th, and had outlined to him the proposal that he resign as of October 31st, and further that his salary would continue for six months beginning November 1st."

"The President then asked if the offer to pay salary for six months period was contingent upon the Treasurer's resigning and stated that he would like to have instructions as to what, if anything, should be paid after the Treasurer's dismissal on October 31st."

and suggested the word "offer" be changed to "suggestion".

Upon motion duly made, seconded and unanimously carried, it was

[fol. 91] RESOLVED that the minutes of the meeting of the Board of Directors held on October 30th, 1942 be

changed so as to substitute the word "suggestion" for the word "offer" as above outlined.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on October 30th, 1942 be amended by adding to the last resolution on Page 1 of these minutes the following: "provided that, with the discontinuance of his services, the Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31st, 1942."

The meeting then recessed, and upon the meeting being reconvened, the President asked the pleasure of the Board.

Admiral Belknap, the Chairman of the Special Committee, stated that the Committee was ready to report, and after a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Reginald R. Belknap President of the Trinity Operating Company, Inc. as of December 1st, 1942 with power to sign checks, together with any other officer so authorized, drawn on funds in any authorized bank account of the company, his compensation to be fixed by the Board of Directors, and it was

FURTHER RESOLVED to employ the services of Mr. Fenimore C. Goode as Assistant to President to take effect immediately, and continue at the pleasure of the Board of Directors, with the understanding that his [fol. 92] compensation shall be determined by Admiral Reginald R. Belknap with power.

Admiral Belknap then resigned as Assistant Treasurer to be effective as of November 30th, 1942, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to accept the resignation of Admiral Reginald R. Belknap as Assistant Treasurer to be effective as of November 30th, 1942.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Mr. Robert T. Gregory Assistant Treasurer of the Trinity Operating Company, Inc. with power to sign checks, together with any other officer so authorized, drawn on funds in any authorized bank account of the company, with the understanding that this office shall be as of December 1, 1942, and continue at the pleasure of the Board.

There being no further business, the meeting adjourned.

FLORENCE D. MEAD,
Secretary.

[fol. 93]

EXHIBIT G

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.

A meeting of the Board of Directors of the Trinity Operating Company, Inc. was held on Monday, December 28th, 1942, at 4:15 P.M., in the Office of the Comptroller of the Corporation of Trinity Church, 74 Trinity Place, New York, N. Y.

Present: The Rector, the President, Messrs. Basler, Foster, Booth, Stickney, Davies, Davis and Mr. Shepard of Counsel.

The President presided as Chairman and acted as Secretary of the meeting.

Notice of Meeting was presented by the President and a waiver of notice was signed by those Directors present.

Reference was made to letters written by Mr. Stickney under dates of November 30th and December 8th, 1942,

requesting correction of the minutes of the meeting of October 30th, 1942.

Upon motion made, seconded and unanimously carried, it was

RESOLVED that the resolution in the minutes of the meeting of Trinity Operating Company, Inc. of October 30th, 1942, relating to payment to Mr. Harris W. Watkins in appreciation of his past services be amended to read as follows:

RESOLVED that the President be authorized to pay to Mr. Harris W. Watkins the sum of \$8,000. in equal monthly installments of \$1,333.33 each for a period of six months beginning November 1, 1942, in appreciation of his past services; provided that with the discontinuance [fol. 94] of his services, Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31, 1942.

After discussion and upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Miss Phyllis A. M. Crouch Secretary of the Trinity Operating Company, Inc., to continue at the pleasure of the Board.

After discussion and upon motion duly made, seconded and unanimously carried, it was

RESOLVED that Fenimore C. Goods, Assistant to the President of the Trinity Operating Company, Inc., be empowered to sign cheques, together with any other officer so authorized, drawn on funds in any authorized bank account of the company

s/ — — —
Acting Secretary.

[fol. 95]

EXHIBIT H

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.

A meeting of the Board of Directors of the Trinity Operating Company, Inc. was held on Friday, January 8th, 1943, at 4 P.M., in the Office of the Corporation of Trinity Church, 74 Trinity Place, New York, N. Y.

PRESENT: The Rector, Admiral Belknap, President, Messrs. Davis, Davies, Booth, Hasler, Foster, Bayne, Mr. Shepard of Counsel and the Secretary. Mr. Stickney had asked to be excused.

The President acted as Chairman of the meeting and the Secretary of the Company acted as Secretary.

The minutes of the meeting of December 28th, 1942, were presented to the meeting and, copies thereof having been sent to each member, the reading thereof was dispensed with.

Upon motion made, seconded and carried, it was

RESOLVED that said minutes be approved and that the action of the Board at said meeting be ratified.

The President called attention to the fact that the minutes of the meeting of the Board held November 19th, 1942, did not specifically show the resignations of Mr. Alden D. Stanton as Trustee and Miss Florence D. Mead as Secretary of the Trinity Operating Company, Inc. Retirement Plan and the acceptance of those resignations by the Board as of November 30th, 1942.

Upon motion made, seconded and carried, it was

RESOLVED that corrections be made in the minutes of the meeting of the Board held on November 19th, 1942, to show the following:

[fol. 96] "It was reported resignations as a Trustee under the Pension Plan of the Trinity Operating Company, Inc. had been received from Mr. Alden D. Stan-

ton, such resignation to be subject to the pleasure of the Board of Directors."

"It was also reported resignation as Secretary of the Pension Plan of the Trinity Operating Company, Inc. had been received from Miss Florence D. Mead, such resignation to be subject to the pleasure of the Board of Directors."

"Upon motion duly made, seconded and carried, it was

"RESOLVED that the resignation of Alden D. Stanton as Trustee of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942."

"RESOLVED that the resignation of Florence D. Mead as Secretary of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942."

After discussion and upon motion duly made, seconded and unanimously carried, it was

RESOLVED that Mr. Allan Davies be elected a Trustee of the Trinity Operating Company, Inc. Retirement Plan to take the place of Alden D. Stanton who resigned, as of November 30th, 1942.

Mr. Davis presented a report of the Special Committee appointed at the meeting of the Board held on November 5th, 1942, consisting of Messrs. Belknap, Davis and Davies, "to take the necessary steps to investigate and interview applicants to succeed the present officers, with a view to [fol. 97] reorganizing and reestablishing the organization".

Mr. Davis stated that the Special Committee wished to nominate for the Presidency of the Trinity Operating Company, Inc., Mr. Alfred Francis Gregory Nowakoski, and read a report concerning Mr. Nowakoski and his experience.

Discussion took place and, thereupon, Admiral Belknap tendered his resignation as President of the Trinity Operating Company, Inc., at the pleasure of the Board.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to accept the resignation of Reginald R. Belknap as President of the Trinity Operating Company, Inc., as of January 15th, 1943; and be it

FURTHER RESOLVED as a slight evidence of the Board's appreciation of his goodness in taking over the work of this officership from November 30th, 1942, to award Admiral Belknap an honorarium of Five Hundred (\$500.) Dollars.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Alfred Francis Gregory Nowakoski as President of the Trinity Operating Company, Inc., as of January 15th, 1943, with power to sign cheques, together with any other officer so authorized, drawn on funds in any authorized bank account of the Company; his holding office to continue at the pleasure of the Board of Directors; and be it

[fol. 98] FURTHER RESOLVED that Mr. Nowakoski's salary as President of the Trinity Operating Company, Inc., be at the rate of Twelve Thousand (\$12,000.) Dollars per annum, to continue at the pleasure of the Board.

Upon motion made, seconded and unanimously carried, it was

RESOLVED that the Committee be given a vote of thanks for their work in connection with the selection of a new President of this Company.

There being no further business to come before the meeting, it was, upon motion, adjourned.

s/ P. A. M. Crouch,
Secretary.

[fol. 99]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 329—October Term, 1958.

(Argued May 14, 1959)

Decided July 6, 1959.)

Docket No. 25569

ALDEN D. STANTON and LOUISE M. STANTON, Appellees,

—v.—

UNITED STATES OF AMERICA, Appellant.

Before: Hand, Swan and Hincks, Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Byers, J., presiding), granting judgment to the plaintiffs for the refund of an income tax for the year 1943, with interest.

Howard Heffron, for the appellant.
Clendon H. Lee, for the appellees.

HAND, Circuit Judge:

The plaintiffs sue to secure a refund of \$15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In [fol. 100] 1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was \$22,500. In November, 1943, he voluntarily resigned as Comptroller, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller

of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars *** provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of \$10,629.57. The plaintiffs eventually paid this with accumulated interest, \$15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although [fol. 101] the donee had no right to enforce its payment. The last of our decisions in *Carragan v. Commissioner*, 197 Fed. (2) 246, 248, so declares and in *Nickelsberg v. Commissioner*, 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus v. Commissioner*, 302 U. S. 34, is the only decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopeo," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only \$4,000,000 for "Unopeo," a corporation whose "only business was the investment and management of the assets thus acquired."

"Unopeco" made a general distribution as a "gift" or "honorarium" of \$600,000 to all the former employees of "Universal," of which the plaintiff's share was \$10,000. Although the shareholders of "Unopeco" had been the same as those of "Universal," the donees were not continued as employees of "Unopeco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopeco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. In the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, [fol. 102] as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was thought to have no such rights, but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in deciding whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus v. Commissioner*, *supra*, at times it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham v. Commissioner*, 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support in action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure

of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitative terms of whatever financial gains the pastor may have contributed to the corporation. *Schaff v. Commissioner*, 174 Fed. (2) 893 (C. A. 5); *Mutch v. Com-* [fol. 103] *missiongr*, 209 Fed. (2) 390 (C. A. 3); *Abernethy v. Commissioner*, 211 Fed. (2) 651 (C. A. D. C.). We cannot say positively that in the case at bar this second factor may not have had any place in the action of the board of directors of the Operating Company; but, since Mr. Stanton's duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Comissioner's determination is wrong. *Welch v. Helvering*, 290 U. S. 111, 115; *Helvering v. Taylor*, 293 U. S. 507, 515; his decision is prima facie correct; *Wickwire v. Reinecke*, 275 U. S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, Circuit Judge (dissenting) :

In *Helvering v. American Dental Co.*, 318 U. S. 322, 327, it was said; "The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus v. Commissioner* [fol. 104] *sioner*, 302 U. S. 34, on the one side and upon the other by *Noel v. Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co. v. Commissioner*, 257 U. S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel*.

In *Bogardus v. Commissioner*, 302 U. S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the disbursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there *might be ground for the inference* that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would *necessarily* have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646, at 648-9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donee, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

In the *Noel* case, referred to in *Helvering v. American Dental Co., supra*, as illuminating the dividing line from the other side, there were factors not present here, which

[fol. 105] cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration." Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

" * * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt."

"We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. Elm-[fol. 106] *hurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481."

In the case now before us a search "among competing aims or motives [for] the ones that dominated conduct" will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton

into close personal contact* with the vestry and wardens of the church and with the directors of the Operating Company several of whom testified that a general feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate;** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus*, rather than more complete requital for past service [fol. 107] vicés, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general finding below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is not so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters v.*

* Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of "good will, esteem, or kindness" than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

** It was almost twice that later provided for his successor.

Smith, 3 Cir., 221 F. 2d 721; *Nickelsburg v. Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the Tax Court,* may not be disturbed unless clearly erroneous. *Plaut v. Munford*, 2 Cir., 188 F. 2d 543; *Smith v. Hoey*, 2 Cir., 153 F. 2d 846; *Scott v. Self*, 5 Cir., 208 F. 2d 125; *Smythe v. Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U. S. 102; *Wickwire v. Reinecke*, 275 U. S. 101; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir., 25 F. 2d 837; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe v. Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters v. Smith*, *supra*; it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

[fol. 108] Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appellate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both, *Carragan v. Commissioner*, 2 Cir., 197 F. 2d 246, and *Nickelsburg v. Commissioner*, *supra*, are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

* 26 U. S. C. A. §7482(a) provides

"(a) *Jurisdiction*.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; • • •."

[fol. 109]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALDEN D. STANTON and LOUISE M. STANTON,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

JUDGMENT—July 6, 1959

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 120]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ORDER DENYING PETITION FOR REHEARING—July 30, 1959

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 141]

**IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

Present: Hon. Charles E. Clark, Chief Judge, Hon. J. Edward Lumbard, Hon. Stern R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

**ORDER DENYING PETITION FOR REHEARING EN BANC—
October 22, 1959**

A petition for rehearing en banc having been referred to the active judges of this Court,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 142] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 143]

SUPREME COURT OF THE UNITED STATES

No. 546, October Term, 1959.

ALDEN D. STANTON, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 376.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.